No. 92-903-CFY Title: Posters 'N' Things, Ltd., et al., Petitioners
v.
United States

Docketed: November 16, 1992 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Nov 12 1992	Application (A92-382) to extend the time to file a petition for a writ of certiorari from November 15, 1992 to November 30, 1992, submitted to Justice Blackmun.
	Nov 13 1992	Application (A92-382) granted by Justice Blackmun extending the time to file until November 30, 1992.
	Nov 16 1992	Petition for writ of certiorari filed.
	Dec 28 1992	Order extending time to file response to petition until January 27, 1993.
	Jan 26 1993	Order further extending time to file response to petition until February 10, 1993.
	Feb 10 1993	Brief of respondent United States in opposition filed.
	Feb 17 1993	DISTRIBUTED. March 5, 1993
	Mar 8 1993	Petition GRANTED.
		**********
	Apr 21 1993	Brief of petitioners Posters 'N' Things, Ltd., et al. filed.
	Apr 21 1993	Joint appendix filed.
	May 10 1993	Record filed.
	May 17 1993	Record filed.
	May 21 1993	Order further extending time to file brief of respondent on the merits until June 7, 1993.
	Jun 7 1993	Brief of respondent United States filed.
	Aug 2 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT TUESDAY, OCTOBER 5, 1993. (1ST CASE).
	Oct 5 1993	ARGUED.

Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

92-903

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

POSTERS 'N' THINGS, LTD., and
LANA CHRISTINE ACTY,
PETITIONERS

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. §857, has been applied unconstitutionally in violation of due process requirements of the Constitution.

2. Whether the Mail Order Drug Paraphernalia Control Act 21 U.S.C. §857, has a subjective scienter competent which would require, as a condition precedent for conviction, proof that a retailer intended that the items be used for drugs.

3. Whether 21 U.S.C. §841(a)(1), can be applied to substances deemed objectively as a per se violation of 21 U.S.C. §857, and, when deemed objectively illegal, whether these definitions can be used as a basis for a violation under 21 U.S.C. §841(a)(1).

4. Whether proof was adequate below for a jury to find guilt under 21 U.S.C. §841(a)(1).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is contained in Appendix A.

The opinion of the United States District Court for the Southern District of Iowa is contained in Appendix B.

JURISDICTION

The Court of Appeals for the Eighth Circuit ("Eighth Circuit") filed its judgment on July 13, 1992. On August 17, 1992, the Eighth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Certiorari review is appropriate because the case involves important questions of federal law which have not been, but should be, settled by this Court. Further, the decision of the Eighth Circuit Court of Appeals in this case directly conflicts

with decisions of the Second, Sixth and Tenth Circuits, as well as a multitude of Federal Courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Mail Order Drug Paraphernalia Control Act. 21 U.S.C. §857 ("Section 857"), is set forth in Appendix C.

2. 21 U.S.C. §841(a)(1) ("Section 841") is set forth in Appendix D.

3. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Jurisdiction of the District Court of the Southern District of Iowa was based on 18 U.S.C. § 3231. The jurisdiction of the Eighth Circuit Court of Appeals was based on 28 U.S.C. § 1291.

Appellant Acty was charged with two counts of using an interstate conveyance to transport drug paraphernalia, in violation of 21 U.S.C. § 857(a)(1); two counts of conspiring to use interstate conveyance to sell drug paraphernalia, in violation of 18 U.S.C. § 371 and 21 U.S.C. § 857(a)(1); aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; Investment of illicit drug profits in violation of 21 U.S.C. § 854; laundering of monetary instruments, in violation of 28 U.S.C. § 1956(a)(1)(A); and two counts of engaging in monetary transactions with

proceeds of unlawful activity, in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

Appellant Posters 'N' Things ("Posters") was charged with two counts of using interstate conveyance for the sale of drug paraphernalia in violation of 21 U.S.C. 857(a)(1); and one count of conspiring to use interstate conveyance for the sale of drug paraphernalia in violation of 18 U.S.C. 371.

On the 28th of December, 1990, both Appellants were found guilty on all counts following a jury trial. On June 11, 1991, the District Court sentenced Appellant Acty to 108 months in prison on each count of conviction, to be served concurrently. Appellant began serving that sentence on October 7, 1992. Appellant Posters was fined $75,000 on each count, concurrently, with a special assessment of $600, for a total amount due of $75,600.

Appellants Acty and Posters filed an appeal with the Eighth Circuit Court of Appeals on December 9, 1991, challenging the constitutionality of the drug paraphernalia charges and the sufficiency of the evidence on the money laundering counts. On July 13, 1992, a three-judge panel of the Eighth Circuit denied the Appellants' appeal. On August 17, The Eighth Circuit denied the Appellants' application for rehearing and rehearing en banc.

Facts Relevant to Review

In March of 1990, law enforcement officer executed search warrants for the home of Appellant Acty and her husband, George Michael Moore, and for three businesses operated by Poster's N' Things, Ltd., a business formed by Appellant Acty

in 1977. The businesses were a diet aid store, an art gallery, and "World Wide Imports", a merchandise store.

United States Government Customs agents along with special agents for the Internal Revenue Service seized from the store a number of inventory items alleged to constitute drug paraphernalia as defined by the Mail Order Drug Paraphernalia Control Act ("Drug Paraphernalia Act") in violation of 21 U.S.C. §857. Under the search warrant, the officials were to seize items, including, but not limited to, all materials of any kind which were primarily intended for use in manufacturing, compounding, processing, or preparing a controlled substance including "cuts" and specifically cited mannitol, procaine, and inositol as drug paraphernalia. All the

items that were eventually seized were in their original packaging; none had yet been used.

None of the seized items are primarily intended for use with illegal drugs. While the warrant sought items primarily intended for use with controlled substances, once these items were introduced at trial, the jury was not allowed to determine on their own, whether or not the items were illegal paraphernalia. Instead, the District Court adopted an objective definition of paraphernalia. The jury was instructed, under Jury Instructions number 37 and 39,(Appendix "E" and "F" hereto, infra) that the items of evidence including, but not limited to, those listed, under 21 U.S.C. §857(d)(1)-(15), were **per se** drug paraphernalia. Under this objective approach, the intent on the part of the Petitioners was deemed not relevant to

their guilt or innocence under the Drug Paraphernalia Act. The items offered into evidence included mannitol, mannite, and inositol, whose sale as a drug paraphernalia the government alleged was violative of 21 U.S.C. §841(a)(1). The government's own witnesses, United States Customs officer John Stecker and prosecution witness William Hopkins testified that drug paraphernalia was to be determined on a subjective basis with the guilt of the Petitioners to be determined in light of their intent. The government's witnesses stated that the substances mannitol, mannite, or inositol were drug paraphernalia.

This case presents two important issues. The first is whether the Drug Paraphernalia Act may be constitutionally applied on an objective

basis, as it was in this case. Such an construction would reject a retailer's intent in determining guilt or innocence. The Courts of Appeals are split on this issue. The United States Customs and Internal Revenue Service agents in this case seized items which they alleged to be primarily intended for use with illegal drugs. Under the terms of §857(d), the statute may only be applied to items "primarily intended or designed" for use with controlled substances. To avoid unconstitutional vagueness, the statute must require an intent on the part of the Petitioners to distribute the items for drug use. Section 857 must, thereby, contain a subjective scienter requirement as applied to the retail Petitioners. Since the Court instructed the jury that the Drug Paraphernalia Act was objective in nature including such items as mannitol,

mannite, and inositol, the Act has been applied unconstitutionally in this case in violation of the standards announced by this Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("Hoffman Estates").

The second issue is whether the mannitol, mannite, inositol, "cuts", or "adulterants," alleged to be drug paraphernalia, were properly presented to the jury for their determination as to whether or not they were paraphernalia. In finding the Petitioners guilty of 21 U.S.C. §841(a)(1), the jury heard the government's witnesses testify and they were subsequently instructed by the Court, that the alleged "cuts" or "adulterants" were per se illegal on an objective basis in violation of 21 U.S.C. §857. This sale of substances deemed objectively to be drug

paraphernalia satisfied the jury's question of the intent, on the part of the Petitioners, to assist in the manufacturing of a controlled substance in violation of 21 U.S.C. §841(a)(1). The District Court's error, in Jury Instruction number 37 which compelled the jury to find mannitol, mannite, or inositol, to be drug paraphernalia **per se**, violated the jury's ability to determine the Petitioners' intent, under 21 U.S.C. §841(a)(1), in violation of the Petitioners' right to Due Process.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE PRIOR JUDGMENT OF THIS COURT IN VILLAGE OF HOFFMAN ESTATES V. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

In VILLAGE OF HOFFMAN ESTATES V. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) the Supreme Court upheld the constitutionality of a drug paraphernalia ordinance which applied to items "designed or marketed for use" with controlled substances. Id., 455 U.S. at 500, 102 S.Ct. at 1194. In doing so, the court specifically stated that proof of scienter on the part of the defendant was a requirement in order to prevent the statute from being considered void for vagueness. Id., footnote 17. The Eighth Circuit in this case, however, specifically held that proof of a subjective scienter on the part of the defendant was not required.

The ordinance at issue in Hoffman Estates required a business to obtain a license prior to selling any items "designed or marketed for use with illegal

cannabis or drugs." Id., 455 U.S. at 491, 102 S.Ct. at 1189. The Plaintiff in that case raised a pre-enforcement challenge to the facial constitutionality of the ordinance. Id.

Justice Marshall, writing for the majority of the Court, rejected the facial challenge, specifically citing the scienter requirement contained in the phrase "marketed for use." Id., 455 U.S. 499-500, 102 S.Ct. 1194. The Court noted that while the District Court "apparently relied on the growing vernacular understanding of "paraphernalia" as drug-related items . . . a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated." Id.

The Court further determined that the phrase "designed for use" was not unconstitutionally vague on its face since the Plaintiff in the action conceded that

the phrase specifically referred to "structural characteristics of an item." Id., 455 U.S. at 501, 102 S.Ct. at 1195.

Despite this clear statement of the law concerning the constitutionality and scienter requirements for regulations of "paraphernalia", that interpretation was directly contradicted in this case with the Eighth Circuit's interpretation, which applied an objective standard and found all inventory of the Petitioner/retailer to be per se drug paraphernalia. United States v. Posters 'N' Things, Nos. 91-2429, 91-2426, 91-2432, p. 6 (8th Cir. 1992). Justice Marshall's majority opinion stated "[a] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer." Hoffman Estates, 455 U.S. at 501, 102 S.Ct. at 1195. (emphasis added). What the

District Court and the Eighth Circuit have done in this case is to transfer the manufacturer's intent in design to the Petitioners/retailer intent in marketing, and thereby removing the requirement that the government prove scienter on the part of the retailer.

While the Hoffman Court illustrated how an objective scienter could be applied against a designer/manufacturer whose own intent was made clear by the physical characteristics of an item, the Court asserted that the balance of the definition, in the Hoffman ordinance, called for a subjective review of the retailer's intent under the term "marketed for use." "The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use." Id., 455 U.S. at 502, 102 S.Ct. at 1195.

The Petitioners in this case were accused of violating 21 U.S.C. §857 which provides in part:

> (d) Definition of "drug paraphernalia"
>
> The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body,

The statute then goes on to list examples of specific items such as pipes, miniature spoons and bongs which might fit the definition of paraphernalia.

The Eighth Circuit erred in applying an objective designer's intent to the retail Petitioners. The Eighth Circuit compounded its error by completely ignoring the subjective intent on the part of the Petitioner/retailer as required by the phrase "primarily intended." In fact, the Eighth Circuit, in its zeal to uphold the District Court's imposition of an objective standard against the Petitioners/retailer, completely ignored the phrase "primarily intended" as though it did not exist in the law. This error on the part of the Eighth Circuit, violated the Petitioners' Due Process rights as provided by the Fifth Amendment to the United States Constitution.

The objective scienter requirement applied against the Petitioners further manifests itself in the accusation of

aiding and abetting in the violation of 21 U.S.C. §841(a)(1)
(manufacture and distribution of cocaine). The government's witnesses testified that mannitol, mannite, and inositol were "objectively" drug paraphernalia and, thereby in violation of 21 U.S.C. §857. Under 21 U.S.C. §857, the mannitol, mannite, and inositol, were "objectively" viewed in light of the definition of drug paraphernalia which includes items for use in manufacturing, compounding, processing, or preparing a controlled substance. By its own definition, the mannitol, mannite, and inositol defined and "objectively" charged to the jury, under §857, required the jury to find that the substance were intended for manufacturing with a controlled substance. The jury was thus forced to find that the Petitioners

aided and abetted in the manufacture of cocaine under 21 U.S.C. §841(a)(1).

In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court restated the clear constitutional dictate that a jury charge may not create "a presumption that relieves the State of its burden of persuasion on an element of an offense." Id., 471 U.S. at 315, 105 S.Ct. at 1971. See also Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

By using an objective standard, and thus creating per se paraphernalia, the District Court shifted the burden of proof onto the retailers, forcing them to attempt to prove that affected items are not intended for use in connection with controlled substances. Such a shift is a clear violation of the Due Process Clause

of the Fifth Amendment to the United States Constitution.

II. THE QUESTIONS PRESENTED ARE OF SUBSTANTIAL IMPORTANCE, THE RESOLUTION OF WHICH WILL HAVE NATIONWIDE IMPACT.

The instant case involves a challenge to a federal paraphernalia statute, and its application, which is being used to seize inventory from innocent merchants all over the country. Because of the "objective" theory of prosecution as used by the Eighth Circuit in this case versus the "subjective" theory of prosecution as used by the Second, Sixth and Tenth Circuits, as discussed below, a merchant does not know either what he can sell or the manner in which it may be sold.

The Drug Paraphernalia Act, as applied by federal agents herein and as interpreted by the Eighth Circuit below, is

unconstitutionally vague in that it fails to provide fair notice of the person covered and the conduct prescribed. This is evident from the recent decisions among three of the Circuit Courts of Appeals concerning the Act. In the United States Court of Appeals for the Second Circuit in United States v. Schneiderman, 968 F.2d 1564 (2nd Cir. 1992), the Second Circuit ruled that the Drug Paraphernalia Act contained a scienter requirement and required proof of intent on the part of the accused. Id., at 1566, 1567. "To show a defendant "primarily intended" to sell drug paraphernalia, the government need not show that the items would necessarily be used in connection with illegal drugs, but it must prove that the defendant knew there was a strong probability the items would be so used." Id. at 1567. The Sixth Circuit, in

United States v. 57, 261 Items of Drug Paraphernalia, 869 F.2d 955 (6th Cir 1989) also upheld the constitutionality of the Act because they first determined that conviction under Section 857 required proof of the defendant's subjective intent to violate the law. Most recently, the Tenth Circuit Court of Appeals in United States v. Murphy, No. 92-4020 (10th Cir. Oct. 10, 1992) followed the Schneiderman ruling and held that the statute had to be considered subjective in nature.

In addition to ignoring the dictates of Hoffman Estates, the Eighth Circuit decision in this case runs counter to the other three Circuit Opinions. The District Court Opinion in this case relied on the opinion of United States v. Dyer, 750 F.Supp. 1278 (E.D. Va. 1990). The court in Dyer stated that, "In some situations a

violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object," Id. at 1284.

The lack of a clear standard on the standard to be applied leaves legitimate businesses and individuals open to arbitrary, erratic, and discriminatory arrests, prosecutions, convictions, and property seizures. This is particularly true under the Eighth Circuit's interpretation of the Act. Under the Eighth Circuit's interpretation, the Drug Paraphernalia Act puts vast amounts of retail inventory items in serious jeopardy while completely ignoring the intent of the retailer and the manner in which the items are sold.

This Court has previously recognized the importance of issues presented by

statute and ordinances banning "drug paraphernalia" in its decision in Hoffman Estates. A resolution of the conflict between this Court's opinion in Hoffman Estates and the Eighth Circuit's opinion below which clashes with decisions from both the Tenth, Sixth and Second Circuits will have a substantial impact upon merchants in states across the nation.

III. THE DECISION OF THE EIGHTH CIRCUIT IS CLEARLY IN ERROR AND SHOULD BE REVERSED

Under § 857, drug paraphernalia is defined in part as any item which is primarily intended in to be used in the manufacturing or otherwise introducing a controlled substance into the human body. As defined by the district court and upheld by the Eighth Circuit and applied herein, that phrase is unconstitutionally vague. Neither the district court nor the Eighth

Circuit defined the term "primarily intended" nor sought or applied any meaning to the phrase.

Section 857 is based upon the Drug Enforcement Agency's Model Act as propounded by the Department of Justice in 1979. See United States v. Main Street Distributing, Inc., 700 F.Supp. 655 (E.D.N.Y. 1988). Since that time, numerous state and local governments enacted statutes outlawing the sale of drug paraphernalia. While this Court has never reviewed a case involving the Model Act or its progeny, the decision in Hoffman Estates addressed the issue of a retailer's intent in reviewing the term "marketed for use" "[I]t describes a retailer's intentional display and marketing of merchandise." Hoffman Estates, 455 U.S. at 502, 102 S.Ct. at 1195. The standard requires proof of a specific state of mind,

since a retailer could scarcely 'market' for a particular use without intending that use. Id. Under the less specific standard "intended for use," other circumstantial evidence may be considered by a finder of fact, such as the manner of retail display for specific items. Id.. Under Section 857, the term "intended for use," obviously important in the definition of drug paraphernalia, compels a finder of fact to search for the primary intent on the part of the accused retailer. That step was ignored in this case by both the District Court and the Eighth Circuit.

While this Court has not reviewed the defined term "intended for use" in relation to drug paraphernalia, the definition has been clearly established by numerous United States Courts of Appeals. In New England Accessories Trade Association v. City of Nashua, 679 F.2d 1 (1st Cir. 1982), the

Court held that the term referred to, and required proof of, scienter on the part of the charged defendant. Id., at 6.

In Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), the Eighth Circuit was faced with an action by wholesale and retail distributors challenging the constitutionality of a Nebraska statute prohibiting the sale and manufacture of drug paraphernalia. The Court, in upholding the constitutionality of the statute, held that the phrase "intended for use" referred to the intent of the person charged with the violation. Id., at 559. A similar ruling was also made by the Fifth Circuit in Tobacco Accessories and Novelty Craftsmen Merchants Association of Louisiana v. Treen, 681 F.2d 378 (5th Cir. 1982). See also Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (1981).

Each court cited above, as well as the Courts in Schneiderman, Murphy and 57,261 Items of Drug Paraphernalia, the cases specifically relating to the Act at issue in this case has found that the term "intended for use" referred to the subjective intent on the part of the retailer or distributor of alleged drug paraphernalia.

To be constitutional in its application, the term "intended for use" must allow the finder of fact to determine that the accused has intended or, in this case under section 857, that the defendant primarily intended the items which they sold to be used with controlled substances. In this case, however the district court rejected the clear majority of opinions and specifically informed the finder of fact, under Jury Instructions No. 37 and 39, that the items listed in the law were indeed

drug paraphernalia and that the intent on the part of the accused retailer was not relevant. Under this objective standard applied by the District Court in this case and upheld by the Eighth Circuit, the substances mannitol, mannite, and inositol, referred to as cuts and adulterants, were not determined by the jury to be paraphernalia, but were determined by the court to be paraphernalia in the Court's Jury Instructions Number 37 and 39.

These instructions advised the jury to view alleged drug paraphernalia objectively, to find that the items were illegal, and to disregard any intent on the part of the Petitioners/
retailer. This amounted to a clear order to the jury to direct a verdict against the Petitioners for a violation of 21 U.S.C. §841(a)(1). Inserting the court's standard for mannitol, mannite, and inositol in the

Drug Paraphernalia Act into a statute which required intent provides no notice to retailers as to what will or will not be considered illegal. This failure in interpretation violated the retail defendant's Fifth Amendment rights to Due Process of Law. As each count of Petitioners' conviction is directly based on the paraphernalia convictions, a reversal of all counts is therefore required.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the court grant this petition for a Writ of Certiorari.

APPENDIX

Appendix A. United States v. Posters 'N' Things, Ltd. and Lana Christine Acty, Nos. 91-2426, 91-2429, 91-2432 (8th Cir. 1992).

Appendix B. Order Denying Petition for Rehearing and Suggestion for Rehearing En banc, United States v. Posters 'N' Things, Ltd. and Lana Christine Acty, Nos. 91-2426, 91-2429, 91-2432 (8th Cir. 1992)

Appendix C. 21 U.S.C. §857, later recodified as 21 U.S.C. §863(d).

Appendix D. 21 U.S.C. §841(a).

Appendix E. Jury Instruction No. 37.

Appendix F. Jury Instruction No. 39.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 91-2426

United States of America,

Appellee,

v.

Posters 'N' Things Ltd, an Iowa Corporation d/b/a World Wide Imports; d/b/a Forbidden Fruit; d/b/a Acty-Moore Gallery,

Appellant.

No. 91-2429

United States of America,

Appellee,

v.

Lana Christine Acty, a/k/a Chris Acty,

Appellant.

Appeals from the United States District Court for the Southern District of Iowa

No. 91-2432

United States of America, *
*
Appellant, *
*
v. *
*
Lana Christine Acty, a/k/a Chris Acty, *
*
Appellee. *

Submitted: December 9, 1991

Filed: July 13, 1992

Before BEAM, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

BEAM, Circuit Judge

Posters 'N' Things, Ltd. ("Posters") and Lana Christine Acty were convicted of a variety of offenses related to the sale of drug paraphernalia. Poster and acty appeal from their convictions, claiming that 21 U.S.C. §857, prohibiting the sale of drug paraphernalia in foreign or

interstate commerce, is unconstitutional. Acty also appeals on the ground that there is insufficient evidence to support her convictions for laundering monetary instruments and for aiding and abetting the manufacture and distribution of cocaine. The government cross-appeals claiming, among other points, that the district court, erred by failing to sentence Acty to the mandatory minimum years of imprisonment required by 21 U.S.C. §841(b). The government also claims that the district court erred by departing below the guideline-specified sentencing range. We affirm the district court in all respect.

I. DISCUSSION

Posters, which was formed by Acty in 1977, operated three businesses: a diet aid store, an art gallery, and "forbidden Fruit" (renamed "World Wide Imports"), a merchandise store. Posters and Acty came

under investigation after law enforcement officers received complaints that the merchandise store was selling drug paraphernalia and after officers working on other drug-related cases discovered drug paraphernalia and drug diluents purchased from Forbidden Fruit.

Following an investigation, law enforcement officers executed search warrants in March 1990 for the merchandise store, the art gallery, and the residence of Acty and her husband, George Michael Moore. As a result of these searches, officers confiscated, among other items, various business and financial records, drug paraphernalia (e.g., pipes, bongs, scales, roach clips, cocaine mirrors), cash, chemicals used to dilute cocaine (e.g., Mannitol, Inositol, and Lidocaine), and catalogs and other advertisements from Forbidden Fruit's suppliers and from

Forbidden Fruit itself. Posters and Acty (and Moore) were eventually indicated on a number of charges and doing jury trial was held in December 1990.[1]

Following the trial, the jury found Acty and Posters guilty of use of interstate conveyance to transport drug paraphernalia, in violation of 21 U.S.C. §857(a)(1) (two counts for each defendant. Acty alone was also found guilty of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2; investment of income derived from a violation of 21 U.S.C. §841(a)(1), in violation of 21 U.S.C. §854; laundering of monetary instruments, in violation of 28 U.S.C. §1956(a)(1)(A); conspiring to

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[1]This appeal does not include Moore. He failed to appear for sentencing and, apparently, is still a fugitive.

launder monetary instruments, in violation of 18 U.S.C. §371 and 18 U.S.. §1956(a); and engaging in monetary transactions with proceeds of unlawful activity, in violation of 18 U.S.C. §1957 and 18 U.S.C. §2 (two counts).

At sentencing, the district court fined Posters $75,000 and sentenced Acty to 108 months in prison on each count of conviction to be served concurrently. In sentencing Acty, the district court departed from the guidelines by not grouping the offense level for the aiding and abetting count with the other counts, on the basis that Acty's case was "essentially a drug paraphernalia and money laundering case, not a case of aiding and abetting." Acty's Judgment at 5.

Posters, Acty, and the government appeal from the judgments of the district court. Posters and Acty claim that the

drug paraphernalia statute, 21 U.S.C. §857(a)(1), is unconstitutional for vagueness. Acty also claims that her convictions for aiding and abetting the distribution of cocaine and for laundering monetary instruments are not supported by sufficient evidence. The government claims that the district court erred by not sentencing Acty to the mandatory minimum sentence of ten years' imprisonment required 21 U.S.C. §841(b) for the aiding and abetting count, and by departing from the guideline-specified sentence on the aiding and abetting count.

II. DISCUSSION

A. Constitutionally of 21 U.S.C. (857.

Section 857 of Title 21 of the United States Code was enacted by Congress as part of the Anti-Drug Abuse Act of 1986. Section 857--which was repealed in 1990 and

recodified with a slightly broader scope at 21 U.S.C. §863--made it unlawful to sell drug paraphernalia in interstate of foreign commerce. Section 857 provided, in part:

> (a) Unlawfulness
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> It is unlawful for any person--
> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
> (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
> (3) to import or export drug paraphernalia.
>
> . . .
>
> (d) Definition of "drug paraphernalia"
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> The term "drug paraphernalia" means any equipment product, or material of any kind which is primarily intended or designed for use of manufacturing, compounding, converting, concealing, producing, processing, preparing,

injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use of ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as--

(1) metal, wooden, acrylic, glass, stone plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes

(8) carburetor pipes;

(9) electric pipes

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia:

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying

the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to--

(1) any person authorized by local, State, or Federal law to manufacture, posses, or distribute such items, or

(2) any items that , in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

21 U.S.C. §857.

1. **Scienter**

We begin our analysis of Posters and Acty's constitutional challenge to section 857 by considering their claim that section 857 violates the Due Process Clause of the Fifth Amendment because it does not contain an express, subjective scienter or knowledge requirement. According to Posters and Acty, the language of section

857 and its legislative history demonstrate that section 857 is a strict liability criminal statute, and, therefore, it is unconstitutionally because strict liability criminal statutes are only permitted for regulatory offenses or for offenses with small or monetary penalties. We disagree that section 857 violates due prccess and we hold that section 857 contains an objective scienter requirement.f

There are a number of federal court opinions on section 857 and its scienter requirement. These cases can be summarized in three categories. First, there are a group of decisions that hold a subjective-type scienter must be read into section 857. In other words, the government must prove at trial that a defendant (such as Acty) intended that the items she offered for sale would be used with controlled substances or that she herself designed the

items for use with controlled substances. See, e.g., United States v. Main Street Distributing, 700 F. Supp. 655, 666 (E.D.N.Y. 1988) (The government is "required to prove at trial that [a defendant] either designed the items listed in the indictment for use with controlled substances or intended them to be for drug use"); cf. United States v. 57,261 Items v Drug Paraphernalia, 869 F.2d 955, 957 (6th Cir.) ("The person to whom the statute is being applied . . . must have knowledge that there is a strong probability that the items will be used" for drug use), cert denied, 493 U.S. 933 (1989).[2]

Second, some courts have decided, as the district court did in Posters and

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[2]Although neither Posters and Acty nor the government argue in this case that section 857 contains a subjective scienter as interpreted by these cases, we must still consider the possibility in our analysis.

Acty's case, that section 857 contains an objective scienter requirement. In other words, that "[i]n some situations a violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object." United States v. Dyer, 750 F. Supp. 1278, 1284 (E.D. Va. 1990). Under this position, a defendant, "of course, remains free to contest the government's proof with her or his own objective facts." Id.

Third, is a category of cases in which courts have held that the language of section 957 cannot be construed to contain a scienter requirement and, in fact, Congress did not intend a scienter requirement. These courts have held that section 857 is unconstitutional as a strict liability offense See e.g., United States

v. Schneiderman, 777 F. Supp. 258, 271 (S.D.N.Y. 1991); United States v. Murphy, 91-NCR-61G, Order of Dismissal (D. Utah Jan. 7, 1992) (brief, unpublished order stating, "[T]he Court finds that the provisions of 21 U.S.C. 863(a) (formally 21 U.S.C. 857) are unconstitutionally vague and that the statute does not provide a scienter or intent requirement as required by the Constitution").

The omission of subjective scienter language from a statute does not preclude a court from reading such a knowledge requirement into the statute. See Morissette v. United States, 342 U.S. 246, 250 (1952). And if we follow cases like Main Street Distributing, and read a traditional subjective scienter into section 857, we would afford greater latitude to defendants like Acty and we would make it more difficult for the

government to obtain convictions. Indeed, were it not so evident from the statute itself that section 857 contains an objective scienter component, we would construe section 857 in this way, and, thus, we would remand Poster and Acty's case for retrial under a differently stated standard. Cf. Liparota v. United States, 471 U.S. 419, 425 (1985) (so long as there is no "indication of contrary purpose in the language or legislative history of [a] statute," a court can read a **mens rea** into a statute).

We see nothing in the language of section 857 that would require a subjective scienter interpretation.[3] Section 857 does

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[3]In addition to the language of section 857 itself, we also considered its legislative history to see if this record contradicted our reading of the statute. The legislative history, however, consists of only one report of one committee hearing on an early version of the statute. From this meager record, and by relying on one

not contain any exclusive, subjective scienter language, nor does it contain any language which implies an exclusive, subjective scienter. Nowhere in the statute, for example, does it state that a person is only prohibited from "knowingly" selling drug paraphernalia or from selling items with the "intent" that they be used as drug paraphernalia.[4] Instead, section

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or two statements by one Representative, the district court in Main Street Distributing concluded that "there can be no doubt that Congress did intend to include a [subjective] scienter element in §857." Main Street Distributing, 700 F. Supp. at 664. We are unconvinced and have found that what little legislative history exists is either contradictory or of no help in interpreting the statute. See also Dyer, 750 F. Supp. 1288-89.

[4]In this respect, Congress appears to have deviated from the language of the Drug Enforcement Agency's Model Drug Paraphernalia Act of 1979, upon which section 857 is modeled. The Model Act states, in relevant part:

> It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act.

Model Drug Paraphernalia Act, art. II, sec. B (1979) (emphasis added) (full text of Model Act is published in Appendix B of Main Street Distributing, 700 F. Supp. at 671-73). Congress's statute, quoted above, contains no such language in the statement of the offense in subsection 857(a).

857 simply states that it is unlawful to sell or deal in "drug paraphernalia," and it defines drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use" (emphasis added) with a controlled substance. We believe this "designed for use" language establishes unambiguously

that the offense contains an objective scienter. The "design" of an object refers to its objective features, and in the case of some drug paraphernalia, items as they are designed have no function other than to be used with illicit drugs As the district court explained in Dyer,

> [b]ecause these items may be identified by their physical characteristics and design features, there is no need for a demonstration of the defendant's subjective intent. Where the illicit purpose of the manufacturer or designer is embodied in the object itself, that purpose is apparent to all who perceive the object. "All that is required is for persons to open their eyes to the

> 'objective realities' of the items sold in their businesses."

Dyer, 750 F. Supp. at 1285 (quoting Garner v. White, 726 F.2d 1274, 1282 N.8 (8th Cir. 1984) (quoting The Casbah, Inc., v. Thone, 651 F.2d 551, 561 (8th Cir. 1981), cert. denied, 455 U.S. 1005 (1982)). An example of such an item is a "bong," which by design has no purpose (unless one imagines a highly contrived one, like "filling it with water and adding flowers") other than for use with illicit drugs. Id. at n.12. See also Village of Hoffman Estates v. Flipside, 455 U.S. 489, 501 (1982) ("designed for use" language in city's drug paraphernalia ordinance states an unambiguous standard that "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features").

Our conclusion that section 857 and its "designed for use" language creates an objective scienter is strengthened by nearly all of the other provisions of the statute. Subsection (d), for example, lists items which Congress evidently determined are intended or designed for illegal purposes by their very nature and irrespective of a defendant's subjective intent. Dyer, 750 F. Supp. at 1286. Moreover, subsection (e) provides a list of factors to be considered in determining whether an item is drug paraphernalia, and all of these factors are objective in nature - that is, none of them ar dependent on the defendant's subjective state of mind. thus, subsection (e) states that among the "logically relevant factors" to be considered are "advertising concerning its use," "evidence of the ratio of sales of the item(s) to the total sales of the

business enterprise," and "expert testimony concerning its use." See Dyer, 750 F. Supp. at 1286. In addition, as the district court in Dyer, 750 F. Supp. at 1286. In addition, as the district court in Dyer also noted, the whole structure of section 857 supports an objective scienter reading: first the statute "provides a definition and enumerates examples of drug paraphernalia," then "it sets forth various objective factors to be assessed, followed finally by specific, objectively [-] based exclusions. The entire structure focuses on the items of drug paraphernalia, not on the purposes of the defendant." Id. at 1287.

Having concluded that section 857 contains an objective scienter element, we address Posters and Acty's claim that it is therefore unconstitutional as a "strict liability statute." If the conduct

prohibited by section 857 were a criminal offense under common law, like that which was at issue in Morissette, we would be required to either read a traditional subjective scienter into the statute or -- if such a construction was prohibited by the language or intent of Congress -- to hold it unconstitutional as a violation of due process. Morissette, 342 U.S. at 263. Section 857 does not concern conduct prohibited at common law, however, and, therefore, it is not unconstitutional simply on the basis that it does not contain a traditional subjective scienter requirement. The legislature has the prerogative with such statutory offenses to define the elements of the crime. See Liparota, 471 U.S. at 424 ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are

solely creatures of statute").

The Congress has passed statutes in the past which have severely modified or eliminated scienter, and we have upheld them against similar due process challenges. See e.g., Sipes v. United States, 321 F.2d 174, 179 (8th Cir. 1963) (26 U.S.C. § 5851, prohibiting the possession of certain firearms having barrels less than sixteen inches long, does not contain a scienter; "all the scienter which the statute requires" is that defendant knew he was in possession of a weapon). Perhaps the most analogous criminal statutes for purposes of this case are those involving obscenity. Consider, for example, the Supreme Court's decision in Hamling v. United States, 418 U.S. 87 (1974), where the Court held that the government is not constitutionally required

to prove that a defendant knew the materials he dealt with were obscene. but, instead, it was sufficient if the government proved that the defendant had "knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Id. at 123. Thus, although Section 857 does not grant a defendant the protection afforded by a subjective scienter, it is not unconstitutional simply by virtue of this omission.

2 **Vagueness**

Posters and Acty also claim Section 857 violates due process because it is unconstitutionally vague, both facially and as applied. We disagree.

A statute is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v.

Generally Construction Co, 269 U.S. 385, 391 (1926). Because we assume that a person "is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 105,1 08 (1972). Moreover, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law

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Posters and Acty's brief is less than clear on this point. Neither the exact nature nor basis for their claim is stated very well. In the heading of their opening brief, for example, they suggest that they only challenge Section 857 as it was applied to them. In the text of the brief, however, and in their reply brief, they suggest that the statute is vague on its fact. And at oral argument, Posters and Acty's attorney only claimed to make a

constitutional attack on the face of the statute. For certainty's sake, we will address all the arguments, at least so far as we can glean them from the briefs.

law impermissibly delegates basic policy matters to policemen, judge, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09. Because of the nature of section 857, the vagueness standard that we apply is neither the most stringent nor the most tolerant of tests. Section 857 does not threaten "to inhibit the exercise of constitutionally protected rights," therefore it does not receive our most demanding scrutiny. Village of Hoffman Estates, 455 U.S. at 499. But it is also a criminal statute, and not merely an economic regulation, therefore we do not treat it with the greatest tolerance. Id.

Posters and Acty have the burden to demonstrate that section 857 is unconstitutionally vague, and to succeed in their facial sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Such a [statute] simply has no core." Village of Hoffman Estates, 455 U.S. at 495 n.7 (citations omitted). Posters and Acty must "demonstrate that the law is impermissibly vague in all of its application." Id., at 497. Thus, "[i]f it is 'transparently clear' that some particular conduct is restricted by the [statute], the [statute] survives a facial challenge on vagueness grounds." Id. at 507-08 (White, J., concurring). Applying these principles, we cannot agree with Poster and Acty's claims.

Poster and Acty state that Section 857 is unconstitutionally vague on its face because it fails to adequately define or describe what constitutes drug paraphernalia -- that is, that it fails to give fair warning of what is prohibited. We believe, however, that Section 857 properly defines a "core" of prohibited conduct, as required by due process. Subsection (d) defines drug paraphernalia as those items "primarily intended or designed" for use with illegal drugs and it lists examples of items (such as "water pipes" and "bongs") which are prohibited; section (e) lists factors to be considered in determining whether an item is drug paraphernalia; and, subsection (f) exempts certain persons and items "traditionally intended for use with tobacco products": We agree with the district court in Dyer, that this "clear core of prohibited

conduct," "combined with the objective scienter standard, defeats a facial vagueness attack, as the 'interaction of definition and intent allays vagueness.'". Dyer, 750 F.Supp. at 1295 (quoting Levas and Levas v. Village of Antioch, 684 F.2d 446, 453 (7th Cir. 1982)). We also agree with Dyer, that the mitigating effect of scienter is not entirely lost simply "because the scienter requirement is objective in nature." Id, at 1296 (noting that "in Hoffman Estates, the Supreme Court explained that the phrase 'marked for use', was not impermissibly vague when taken in conjunction with the guidelines that referred to objective characteristics such as the manner of display and proximately to uncovered items").

With respect to the statute as applied, Posters and Acty's only point appears to be that the statute is

unconstitutional because law enforcement officers who executed the search warrants were able to "totally ignore" the factors listed in subsection (e) for determining what constitutes drug paraphernalia. Brief for Appellants at 10. Thus, according to Poster and Acty, "the listed characteristics only augment the statute's vagueness." Id. Posters and Acty seem to be arguing, in other words, that Section 857 is vague as applied because the government was able to completely disregard part of the statue and still obtain a conviction. WE simply disagree, however, that the factors in subsection (e) were ignored. The law enforcement officers, and more importantly, the government at trial, repeatedly referred to or used the factors listed (e.g., Posters and Acty's advertising material, expert testimony) to establish that the items being sold were

illegal. The actions of the government in this case are not evidence of the statute's vagueness.

B. **Sufficiency of Evidence**

Acty claims that on two counts -- money laundering and aiding and abetting the distribution of cocaine -- the evidence is insufficient to support her convictions. We consider claims of insufficiency of evidence under a deferential standard of review. Briefly, the evidence is viewed in teh light most favorable to the government; all reasonable inferences to support the verdict are given to the government; and the credibility of witnesses whose testimony supports the government is not judged. United States v. Williams, 897 F.2d 1430, 1432 (8th Cir. 1990). We consider Acty's claims with these principles in mind.

1. **Money Laundering**

First, Acty claims that the evidence is insufficient to support her conviction for laundering money, in violation of 18 U.S.C. Section 1956(a)(1)(B)(i).[5] To convict Acty of money laundering, the government had to prove that she knowingly

[5]Related to the money laundering count, Acty also argues that the district court erred by admitting the testimony of Donald Semesky, an expert witness who testified in support of the government's charge. Acty claims that the district court erred by permitting Semesky to testify that the check Acty deposited in her bank account "affected interstate commerce" under Section 1956(a)(1)(b), that the banks into which Acty deposited money were "financial institutions" under Section 1956(c)(4), and that Acty's financial activities constituted a "concealment" of money under Section 1956(a)(1)(B). Acty claims that by stating these "legal conclusions," Semesky prejudicially usurped the role of the judge and the jury. Rule 704(a) of the Federal Rules of Evidence, however, permits testimony in the form of an opinion that "embraces an ultimate issue to be decided by the trier of fact," and, after reviewing the record of Semesky's testimony, we disagree with Acty that Semesky's testimony did anything more than is permitted by the Rules.

conducted a financial transaction that involved the process of an unlawful activity and that she did so with the knowledge that the financial transaction was designed in whole or in part "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds, of the unlawful activity. 18 U.S.C. Section 18956(a)(1)(B)(i). Acty claims that no evidence was presented to show that she concealed or disguised the proceeds from the Forbidden Fruit store. The evidence is by no means overwhelming, but we disagree that it is insufficient.

Acty knowingly sold both legal and illegal items in her Forbidden Fruit store for more than three years. According to the government, Acty deposited all of the money the store received -- the store was mainly a cash business, taking in thousand

of dollars each day -- into one bank account. Acty kept business records, but according to the government, it was impossible from these records to distinguish the amount received for the sale of legal items from the amount received for the sale of illegal items. Acty and Moore also deposited the receipts from the art gallery into this same account, and then, over the course of time, they withdrew money from this account to purchase automobiles, retirement plans, art work, and other items. By conducting the financial end of her drug paraphernalia business in this way -- commingling in one account, in an indistinguishable way, legitimate business receipts and illegitimate receipts -- a reasonable juror could infer that Acty's actions were designed to disguise the nature or the source of the proceeds from her unlawful

business. If we had sat on the jury, we might not have convicted Acty for money laundering. But in reviewing her conviction on appeal, we are unable to hold that the jury's conclusion was unreasonable.[6]

2. **Aiding and Abetting the Manufacture and Sale of Cocaine.**

Second, Acty claims that the evidence is insufficient to support her conviction for aiding and abetting Randy Kennedy in the distribution of cocaine, in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2. On this count, the

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[6]In support of her argument that the evidence was insufficient, Acty notes that in United States v. Sanders, 928 F.2d 940 (10th Cir.), , cert denied, 112 S.Ct. 142 (1991), the Tenth Circuit held that the appellant's actions in openly purchasing two automobiles in part with cash proceeds from drug activities did not constitute a violation of Section 1956(a)(1)(B)(i) because these were ordinary financial transactions with no evidence of a design to conceal or disguise the source or nature of the proceeds.

evidence is also sufficient. To be convicted of aiding an abetting, the government had to show at trial that Acty associated herself with the venture of manufacturing and selling cocaine, that Acty participated in the event as something she wished to bring about, and that Acty sought by her actions to make it succeed. United States v. McCrady, 774 F.2d 868, 874 (8th Cir. 1985). To phrase this in another way, the government had to show that Acty had a "purposeful attitude" or that some affirmative participation by Acty encouraged the perpetrator. Id.; United States v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990). "Circumstantial evidence is 'intrinsically as probative as direct evidence' and may be the sole support for a conviction." McCrady, 774 F.2d at 874 (quoting United States v. Two Eagle, 633 F.2d 93, 97 (8th Cir. 1980)).

The circumstantial evidence against Acty was considerable. The government showed at trial that Forbidden Fruit sold, among other items, scale and substances commonly used by cocaine dealer to dilute cocaine (e.g. Mannitol, Inositol, and Lidocaine). The government also shoed that at least some of these substances have little or no lawful consumer use. The government, moreover, presented evidence of Acty's advertising, which suggested that she was selling the substances as diluents for cocaine. One product

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Acty's actions however, are distinguishable; not only were Acty's financial transaction in much larger amount and over a much longer period of time, but one could infer from her record keeping and bank deposits and withdrawals that Acty designed her operation to conceal or disguise her illegal proceeds.

called "PseudoCaine," was advertised by Acty as "The Hottest Active Cut In Nation! Its the new cut product everybody who bought Mannitol is now begging for! . . .'Burns' just like the real thing." Joint Appendix at Tab No. 12. In addition, the government presented the testimony of four conviction cocaine dealers, including Randy Kennedy., Each dealer testified that he had brought cocaine diluents from Acty in amounts that drug dealers rather than users would purchase.

We believe that this evidence (an all the reasonable inferences that can be drawn from it) is collectively more than sufficient to support Acty's conviction for aiding and abetting the manufacture and sale of cocaine.

C. Sentencing

In its cross appeal, the government argues that because the district court

found that Acty had aided and abetted the manufacture and distribution of 100 kilograms of cocaine, the district court erred by failing to impose the mandatory minimum prison sentence of ten years, as required by 21 U.S.C. § 841(b)(1)(A). The government also argues that the district court erred by departing from the guideline-specified sentencing range on the aiding and abetting count. (The guidelines range was 188 to 235 months in prison; Acty was sentenced to 108 concurrent months on all counts of conviction.,) We agree that the statute; minimum sentence should have been imposed, but because the government failed to make a timely objection we decline to remand for re-sentencing. We also disagree with the government that the district court erred by departing from the guideline-specified sentencing range.

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8 Curiously, Acty does not respond in her reply brief to the government's argument that she should have been sentenced according to the statute's mandatory minimum sentence. She only addresses the government's argument about the district court's departure from the guideline-specified sentencing range.

First we consider the government;s argument that Acty should be resentenced according to the mandatory 120 months in prison. The Government is correct that once the district court made a finding of fact that Acty had aided and abetted in the manufacture and distribution of 100 kilograms of cocaine, this finding, as a matter o flaw, brought Acty's offense within the purview of 21 U./S.C. § 841(b)(1)(A)(ii). Section 2(a) of Title 18 provides that "[w]hoever commits an offense against the United Stats or aids [or] abets . . . its commission, is punishable as a principal." "This provision is applicable

to the entire criminal code." United States vs. Rector, 538 F.2d 223, 225 (8th Cir. 1976), cert. denied, 441 U.S. 963 (1979); see also U.S.S.G. 2x2.1 (guidelines also provide that the offense level for aiding and abetting "is the dame level as that for the underlying offenses"). Thus Acty, who aided and abetted the manufacture and distribution of cocaine, is punishable under the provisions of 21 U.S.C. §841(b)(1)(A)(ii), which provides that any person whose conviction involved "5 kilograms or more" of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years."

The government, however, failed to object to Acty's sentence when it was imposed by the district court. As a general rule, "[i]ssues not properly preserved at the district court level and presented for the first time on appeal

ordinarily will not be considered by this court as a basis for reversal unless there would be a plain error resulting in a miscarriage of justice." United States v. Meeks, 857 F.2d 1201, 1203 (8th Cir. 1988). Ut was plainly an error for the district court to sentence Acty below the statute's minimum, but Acty's sentence of 108 months (as opposed to the statute's required 120 months) does not result in a miscarriage of justice. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990) (no contemporaneous objection; sentence of fifty four months rather than the statute's required sixty months not a miscarriage of justice); see also United States v. Ragan, 952 F.2d 1049, 1049-50 (8th Cir. 1992) (no contemporaneous objection; downward departure from guideline-specified sentencing range not a miscarried of justice). The government,

moreover, received notice--by the presentence investigation report and ny the district court at the sentencing hearing -- that the amount of cocaine involved exceeded five kilograms, and the government had ample opportunity to object to the sentence after the district court notified it that the sentence might be as low as 108 months. See Transcript of Sentencing, col. IV at 471-75. Yet despite this notice and opportunity, the government failed to object.9

Next, we consider whether the district court erred in departing--on the aiding and abetting count--below the guideline specified sentencing range of 188 to 235 months. A district court is permitted to depart downward from the guideline-specified sentencing range if it finds a mitigating circumstance "of a kind, or to a degree, not adequately taken into

consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b); see U.S.S.G. 5K2.0 In reviewing a district court's decision to depart, we must determine (1) whether, as a question or law, the circumstances relied on for departure are sufficiently unusual in kind of degree to warrant the departure, (2) whether, as a question of fact, the circumstances actually exist, and (3)

9The government argues that we should follow the First Circuit's decision in United States v. Rodriguez, 938 F.2d 319, 322 (1st Cir. 1991), where the court held that a sentence below a statute's minimum was subject to a plain error review, despite the failure of the government to make a contemporaneous objection, because the "imposition of a term of imprisonment less than the minimum mandated by Congress affects 'substantial rights'" under Fed. R. Crim. P. 52(b). Id. at 322. Rodriguez, of course, does not control our decision and Rodriguez is distinguishable from Acty's case. In Rodriguez, the Firs Circuit noted that the district court concluded the sentencing hearing without according to the government an opportunity to object. Id. at 321 n.3

whether or not the sentence is reasonable. United States v. Thomas 914 F.2d 139, 143 (8th Cir. 1990).

The government argues that the district court had no authority to depart because Acty was convicted of aiding and abetting and, as an aider and abettor, under the statutes and guidelines, she should be punished just as severely as a principal offender would be punished for the manufacture and distribution of 100 kilograms of cocaine., This reasoning may be fine in the abstract, but it does not take into account the circumstances of Acty's case. The district court, in summarizing its reasons for departing, stated the following:

> The Court finds that the Sentencing Commission, in determining the appropriate range for aiding and abetting sale and manufacture of controlled substances, did not

> have in mind nor adequately provide lower range for the type of circumstances involved here. This is essentially a drug paraphernalia and money laundering case, not a case of aiding and abetting a specific act of manufacturing or distributing controlled substances.

Acty's Judge at 5. We find no error with the district court's decision. As a matter of law, the circumstances of Acty's aiding and abetting conduct are sufficiently unusual in degree--if not in kind--to warrant a departure. Acty's only involvement in the manufacture and distribution in any other way. The district court also seemed to be of the opinion that Acty's sale of cocaine diluent was more in the nature of her business--that is, selling drug paraphernalia--and less in the nature of manufacturing and distributing cocaine. We are reluctant to disagree. Moreover, we believe that Acty's

prison sentence of 108 months for aiding an abetting is reasonable--if not more than reasonable--for her crime.

III. CONCLUSION

For the reasons stated, 21 U.S.C. § 857 is constitutional and Acty's conviction and sentences are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 91-2426/2429SIDM

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

vs. : ORDER DENYING PETITION FOR REHEARING AND SUGGESTION [OR REHEARING EN BANC]

POSTERS 'N' THINGS, LTD. etc., :

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 17, 1992

Order entered at the Direction of the Court:

Michael E. Gins

Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX B

UNITED STATES V. POSTERS 'N' THINGS, LTD. AND LANA CHRISTINE ACTY, No. 90-33 (S.D. Iowa 1990)

Section 21 U.S.C. Section 857(d)

(d) Definition of "drug paraphernalia"

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513). [21 U.S.C.A. § 801 et seq.] It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the

APPENDIX C

human body, such as -

1. metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
2. water pipes;
3. carburetion tubes and devices;
4. smoking and carburetion masks;
5. roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
6. miniature spoons with level capacities of one-tenth cubic centimeter or less;
7. chamber pipes;
8. carburetor pipes;
9. electric pipes;

10. air-driven pipes;
11. chillums;
12. bongs;
13. ice pipes or chillers;
14. wired cigarette papers; or
15. cocaine freebase kits.

Section 841

A. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

1. to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

2. to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

June 11, 1991

INSTRUCTION NO. 37

The term "drug paraphernalia" as defined in section 857(d) of Title 21, United States Code, means any equipment, product or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish,

hashish oil, PCP, or amphetamines into the human body.

The following fifteen sets of items constitute drug paraphernalia:

1. metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
2. water pipes;
3. carburetion tubes and devices;
4. smoking and carburetion masks;
5. roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
6. miniature spoons with level capacities of one-tenth cubic centimeter or less;
7. chamber pipes;

8. carburetor pipes;
9. electric pipes;
10. air-driven pipes;
11. chillums;
12. bongs;
13. ice pipes or chillers;
14. wired cigarette papers; or
15. cocaine freebase kits.

Even if an item does not appear on this list, that item may still constitute drug paraphernalia for purposes of Section 857. In determining whether such an item constitutes drug paraphernalia, in addition to all other logically relevant factors, you may consider the following:

1. instructions, oral or written, provided with the item concerning its use;
2. descriptive materials accompanying the item of which explain or depict its use;

3. national and local advertising concerning its use;

4. the manner in which the item is displayed for sale;

5. whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

6. direct or circumstantial evidence of the ratio of sales of the items to the total sales of the business enterprise;

7. the existence and scope of legitimate uses of the item in the community; and

8. expert testimony concerning its use.

UNITED STATES V. POSTERS 'N' THINGS, LTD. AND LANA CHRISTINE ACTY, No. 90-33 (S.D. Iowa 1990)

June 11, 1991

INSTRUCTION NO. 39

The term "primarily intended", as used in these instructions, does not relate to the knowledge or intent of any particular person or persons. Rather, it is for you to determine the primarily intended use of any item by considering these instructions and all logically relevant factors.

APPENDIX F

Supreme Court, U.S.
FILED
FEB 10 1993
OFFICE OF THE CLERK

No. 92-903

In the Supreme Court of the United States

OCTOBER TERM, 1992

POSTERS 'N' THINGS, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. 857(a)(1) (1988).

2. Whether petitioner Acty was properly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-903

POSTERS 'N' THINGS, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 969 F.2d 652.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. On August 17, 1992, the court of appeals denied a petition for rehearing. Pet. App. A50. The petition for a writ of certiorari was filed on November 16, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioners were convicted on two counts of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. 857(a)(1) (1988). Petitioner Posters 'N' Things, Ltd., was also convicted on one count of conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Lana Christine Acty was convicted on two counts of conspiring to use an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 18 U.S.C. 371; aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); investment of income derived from a drug offense, in violation of 21 U.S.C. 854; money laundering, in violation of 18 U.S.C. 1956(a)(1)(A), and two counts of engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. 1957. Acty was sentenced to 108 months' imprisonment and fined $150,000. Posters 'N' Things, Ltd., was fined $75,000. The court of appeals affirmed. Pet. App. A1-A49.

1. Acty formed Posters 'N' Things, Ltd., in 1977. Posters 'N' Things operated several businesses, including a store named "Forbidden Fruit," which was later renamed "World Wide Imports." Law enforcement officers received complaints that the store was selling drug paraphernalia, and officers working on drug cases found drug paraphernalia and drug diluents (chemicals used to dilute illegal drugs) that had been purchased from Forbidden Fruit. Pet. App. A3-A4.

In March 1990, law enforcement officers executed warrants to search petitioners' business premises and Acty's residence. The officers confiscated business and financial records, drug paraphernalia (including pipes, bongs, roach clips, scales, and cocaine mirrors), cash, drug diluents (including Mannitol, Inositol, and Lidocaine), and catalogs and advertisements describing products sold by petitioners. An advertisement for a product called "PseudoCaine" stated that it was "The Hottest Active Cut In Nation! Its the new cut product everybody who bought Mannitol is now begging for! * * * 'Burns' just like the real thing." Pet. App. A4-A5, A39-A40.

2. In instructing the jury on the elements of the offense of using an interstate conveyance to sell drug paraphernalia, in violation of former Section 857(a)(1), the district court read the statutory definition of "drug paraphernalia," the statutory list of items expressly identified as drug paraphernalia, and the statutory criteria for determining whether an item not specifically listed is "drug paraphernalia."[1] Pet. App. A55-A58. In

---

[1] Section 857(a)(1) provided:

> It is unlawful for any person —
>
> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia[.]
>
> Section 857(d) defined "drug paraphernalia" as
>
> any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act[.]

Section 857(d)(1)-(15) listed 15 specific items that are "drug paraphernalia," including bongs and roach clips. Section 857(e) listed eight criteria that may be considered, "in addition to all other logically relevant factors," in determining whether an item is "drug paraphernalia." Section 857(f) provided exemptions for persons authorized by law to manufacture, possess, or distribute items otherwise covered by the statute and for any item that is traditionally intended for use with tobacco products.

instructing the jury on the statutory definition of drug paraphernalia as any item "primarily intended or designed" for use with illegal drugs, the district court said:

> The term "primarily intended," as used in these instructions, does not relate to the knowledge or intent of any particular person or persons. Rather, it is for you to determine the primarily intended use of any item by considering these instructions and all logically relevant factors.

Pet. App. A59.

3. The court of appeals affirmed. Pet. App. A1-A49. It first upheld the constitutionality of Section 857, rejecting petitioners' claim that the statute was unconstitutional because it lacked a scienter requirement. Pet. App. A12-A26. The court concluded that Section 857 "contain[ed] an *objective* scienter requirement." Pet. App. A13. The court observed that "[t]he omission of subjective scienter language from a statute does not preclude a court from reading such a knowledge requirement into the statute." *Id.* at A16, citing *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). But the court concluded that the statutory definition of drug paraphernalia as including "any equipment, product, or material * * * designed for use" with a controlled substance "establishes unambiguously that the offense contain[ed] an objective scienter" requirement. Pet. App. A19-A20. The court found "nothing in the language of section 857

In 1990, Congress repealed 21 U.S.C. 857 and replaced it with 21 U.S.C. 863 (Supp. II 1990). See Crime Control Act of 1990, Pub. L. No. 101-647, § 2401(b)-(d), 104 Stat. 4859. Section 863 is largely a reenactment of Section 857. But Section 863, unlike Section 857, makes it unlawful "to sell or offer for sale drug paraphernalia." 21 U.S.C. 863(a)(1) (Supp. II 1990). See *United States* v. *Mishra*, 979 F.2d 301, 304 & nn.3-5 (3d Cir. 1992) (describing differences between Sections 857 and 863).

that would require a subjective scienter interpretation." *Id.* at A17. For example, the court pointed out, Congress did not use the word "knowingly" or impose any requirement that items be sold with the "intent" that they be used as drug paraphernalia. *Id.* at A18. The court also noted that Section 857(d) "lists items which Congress evidently determined are intended or designed for illegal purposes by their very nature and irrespective of a defendant's subjective intent." Pet. App. A22, quoting *United States* v. *Dyer*, 750 F. Supp. 1278, 1284 (E.D. Va. 1990). Finally, the court noted that the factors listed in Section 857(e) to be considered in determining whether an item is "drug paraphernalia" were "objective in nature." Pet. App. A22.

The court held that the objective scienter requirement of Section 857 satisfied the requirements of the Due Process Clause of the Fifth Amendment. Pet. App. A23-A26. The court drew an analogy to criminal statutes that prohibit the distribution of obscene materials. In the obscenity context, the court noted, the government is not constitutionally required to prove that the defendant knew the materials were obscene. Instead, it is sufficient if the government proves that the defendant had "knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Pet. App. A26, quoting *Hamling* v. *United States*, 418 U.S. 87, 123 (1974). The court of appeals ruled that the inherent characteristics of an item "primarily intended or designed for use" with controlled substances provide defendants with adequate notice under the Due Process Clause.

The court of appeals also held that Section 857 was not unconstitutionally vague. Pet. App. A26-A33. The court explained that a statute is not facially void for vagueness unless it "is impermissibly vague in all of its application[s]." *Id.* at A29, quoting *Village of Hoffman Estates*

v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). The court ruled that petitioners had failed to make such a showing. The court explained that Section 857 defined a "clear core of prohibited conduct" and contained an objective scienter standard. Pet. App. A30-A31. The court further held that the statute was not unconstitutionally vague as applied to petitioners. The court rejected petitioners' assertion that "the factors in subsection (e) were ignored," finding that the government "repeatedly referred to" the statutory factors "to establish that the items being sold were illegal." *Id.* at A32-A33.

Finally, the court of appeals held that the evidence was sufficient to support Acty's conviction for aiding and abetting the manufacture and sale of cocaine. Pet. App. A37-A40. The court found that the evidence showed that Acty had sold cocaine diluents to at least four cocaine dealers, including Randy Kennedy, whom she was charged with aiding and abetting. The government showed that several of the diluents Acty sold had few or no lawful uses, and one was advertised by Acty as designed and intended for use as a cocaine diluent. The evidence further showed that Acty sold the diluents in amounts that drug dealers, rather than users, would purchase. *Ia.* at A39-A40.[2]

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[2] The court also rejected Acty's claim that the evidence was insufficient to support her conviction for money laundering. Pet. App. A34-A37. Petitioner does not reassert that claim here. Although the court of appeals agreed with the government that the district court had erred by sentencing Acty to less than the mandatory ten-year term of imprisonment for aiding and abetting the manufacture and distribution of more than 100 kilograms of cocaine, the court declined to require resentencing because the government had failed to make a timely objection to the illegal sentence. *Id.* at A40-A45. The court also upheld the district court's downward departure from the Sentencing Guidelines range. *Id.* at A45-A49.

ARGUMENT

1. Petitioners contend (Pet. 12-21) that the court of appeals' decision conflicts with this Court's decision in *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Contrary to petitioners' contention, *Hoffman Estates* strongly supports the court of appeals' decision.

In *Hoffman Estates*, the Court rejected a pre-enforcement facial challenge to the constitutionality of a local ordinance that made it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." 455 U.S. at 492. The Court held that the "designed for use" standard of liability plainly

> encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.

Id. at 501. See also *id.* at 501 n.19. The Court held that this standard of liability was sufficiently clear to pass constitutional muster. In addition, the Court concluded that the alternative "marketed for use" standard of liability "describes a retailer's intentional display and marketing of merchandise" and thus requires proof of "scienter." *Id.* at 502.

Section 857 refers to items "primarily intended or designed for use" with illegal drugs. As the Court recognized in *Hoffman Estates*, an item "designed for use" with illegal drugs is one that is "principally used with illegal drugs by virtue of its objective features." 455 U.S. at 501. Under the analysis of *Hoffman Estates*, an objec-

tive scienter standard of liability based on the "structural characteristics of an item" is constitutionally permissible. *Ibid.*[3]

2. Petitioners also contend (Pet. 22-23) that the court of appeals' decision conflicts with the decisions in *United States* v. *Murphy*, 977 F.2d 503 (10th Cir. 1992); *United States* v. *Schneiderman*, 968 F.2d 1564, 1567 (2d Cir. 1992), petition for cert. pending, No. 92-1174; and *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir.), cert. denied, 493 U.S. 933 (1989). But in all of those cases—and in another recent decision, *United States* v. *Mishra*, 979 F.2d 301 (3d Cir. 1992)—the courts of appeals construed Section 857 to contain a scienter requirement and rejected constitutional challenges to the statute. Although the courts of appeals have differed somewhat in their descriptions of the scienter requirement, there is no conflict in the circuits on that issue that warrants the attention of this Court.[4]

In *Schneiderman*, the court of appeals concluded that the statutory phrase "primarily intended" referred only to the subjective intent of the person charged with dealing in the proscribed articles, and required the government to prove that the defendant knew that there was a

[3] Even if Section 857 lacked any scienter requirement, it would not necessarily follow that the statute was unconstitutional. As one court of appeals has noted, "criminal law has broadened its scope to include * * * breaches of 'regulatory measures in the exercise of . . . the police power.'" *United States* v. *Mishra*, 979 F.2d 301, 305-306 (3d Cir. 1992), quoting *United States* v. *Balint*, 258 U.S. 250, 252 (1922). Accordingly, the courts have rejected due process challenges to criminal statutes that do not require proof of scienter if they have "a moderate penalty scheme similar to that contemplated by" Section 857. *Mishra*, 979 F.2d at 306.

[4] Although petitioners seek to raise the question whether the statute requires subjective scienter, they did not raise that question in the courts below. See Pet. App. 14a n.2.

"strong probability" that the items would be used in connection with illegal drugs. 968 F.2d at 1567. The court went on to recognize, however, that Section 857 also covered a "second category of items," namely those "designed for use" with illegal drugs. 968 F.2d at 1567. The court explained that under that standard, a product qualified as paraphernalia if it was "principally used with illegal drugs by virtue of its objective features." *Ibid.*, quoting *Hoffman*, 455 U.S. at 501. Accordingly, the Second Circuit held that "[i]f the objective features of an item establish *per se* that it is 'designed for use' with illegal drugs, the scienter element is satisfied." 968 F.2d at 1567. In sum, the Second Circuit agrees with the court of appeals in this case that objective factors are sufficient to meet the statute's scienter requirement. Although the Second Circuit views the objective standard as one of two alternative standards of liability, it nevertheless would have affirmed petitioners' convictions under the objective standard.[5]

In *57,261 Items*, a forfeiture case, the Sixth Circuit stated that Section 857

> requires an intent to distribute the items for drug use. The person to whom the statute is being applied * * * must have knowledge that there is a strong probability that the items will be used in this way. The statute thus creates a *scienter* requirement.

869 F.2d at 957. Although that broad language is in some tension with decisions of other courts of appeals recognizing that objective factors alone may satisfy the scienter requirement, the Sixth Circuit's opinion did not focus on or discuss the statutory phrase "designed for

[5] In *Murphy*, the Tenth Circuit "adopt[ed] the position of" the Second Circuit in *Schneiderman*. 977 F.2d at 505. The Third Circuit's decision in *Mishra* also adopts the Second Circuit's position. See 979 F.2d at 306.

use." Moreover, the Sixth Circuit's application of the scienter requirement to the facts of *57,261 Items* indicates that the objective features of an item may satisfy the scienter requirement. The court noted that government witnesses had testified that certain types of ceramic pipes, cigarette holders, and water pipes were "associated exclusively with the inhalation of drugs," and that "[p]ossession or importation of a large quantity of such items for distribution, in itself, raises an inference of guilty knowledge." 869 F.2d at 958. In addition, the court noted that "[t]he most devastating evidence" of scienter was testimony that the defendant sold "substances known to be used primarily for cutting and diluting cocaine, as well as many other items associated with the use of drugs." *Ibid.* In a subsequent case, the Sixth Circuit may further refine its position in light of the statutory phrase "designed for use" and the decisions of other courts of appeals. Accordingly, any tension between *57,261 Items* and the court of appeals' decision in this case does not warrant immediate review by this Court.[6]

3. a. Petitioners were properly convicted of violating 21 U.S.C. 857 (1988), because the items they transported across state lines were "designed for use" with illegal drugs. Some of the items they transported—such as bongs and roach clips—were specifically identified as

---

[6] As the Third Circuit observed in *Mishra*, the debate over whether Section 857 requires "objective" or "subjective" scienter "suggests that the 'subjective/objective' terminology is not of much assistance in giving content to the statutory language." 979 F.2d at 307 n.9. The defendant's subjective expectations may (and usually must) be inferred from objective factors, such as the use of the item in question. "Where the 'illicit purpose of the manufacturer or designer is embodied in the object itself, that purpose is apparent to all who perceive the object.'" *Id.* at 308, quoting *United States* v. *Dyer*, 750 F. Supp. 1278, 1285 (E. D. Va. 1990).

drug paraphernalia in 21 U.S.C. 857(d). The other items—such as cocaine diluents advertised as such—meet the statutory standards of Section 857(e) for items that are drug paraphernalia.

Petitioners repeatedly contend that the district court identified the items at issue as "per se drug paraphernalia" and removed from the jury the determination whether an item was within the statutory definition of drug paraphernalia. See Pet. 8, 11, 12, 15, 20. That is not so. The district court read the jury the entire statutory definition of "drug paraphernalia" and instructed the jurors that "it is for you to determine the primarily intended use of any item by considering these instructions." Pet. App. A55-A59.

b. The evidence was also sufficient to support Acty's conviction for aiding and abetting drug dealer Randy Kennedy in the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). The government introduced evidence that Acty sold drug diluents to at least four drug dealers, including Kennedy, in quantities that would be used by drug dealers rather than by drug users. Pet. App. A40. Moreover, Acty's advertisement for one of the drug diluents specifically stated that it was intended to be used to "cut" cocaine. *Ibid.* The jury instructions required the jury to find that Acty knew "that the crime of the manufacture or distribution of cocaine was being committed or going to be committed by Randy Kennedy" and that she "knowingly acted in some way for the purpose of aiding the commission of the manufacture or distribution of cocaine by Randy Kennedy." Instruction No. 27, C.A. App. Tab 6. By knowingly providing large quantities of diluents to Kennedy, Acty facilitated Kennedy's drug manufacturing and distributing activities and was therefore properly convicted of aiding and abetting him in that enterprise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Assistant Attorney General
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FEBRUARY 1993

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-903

In The

Supreme Court of the United States

October Term, 1992

POSTERS 'N' THINGS, LTD., and
LANA CHRISTINE ACTY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed: November 16, 1992
Petition Granted: March 8, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. POSTERS' N THINGS LTD, an Iowa Corporation d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY; GEORGE MICHAEL MOORE, a/k/a MIKE MOORE, d/b/a G. MICHAEL MOORE ENTERPRISES; AND LANA CHRISTINE ACTY, a/k/a CHRIS ACTY, Defendants.	)	Criminal No. 90-33 (Filed Oct. 17, 1990) SECOND SUPERSEDING INDICTMENT (T. 21, U.S.C., § 857(a)(1)) (T. 21, U.S.C., § 841(a)(1)) (T. 21, U.S.C., § 854) (T. 18, U.S.C., § 1956(a)(1)(A)) (T. 18, U.S.C., § 1957) (T. 18, U.S.C., § 2) (T. 18, U.S.C., § 371) (T. 21, U.S.C., § 853(a)) (T. 18, U.S.C., § 982(a))

THE GRAND JURY CHARGES:

COUNT 1

That on or about August 17, 1989, in the Southern District of Iowa and elsewhere, POSTERS' N THINGS

LTD, d/b/a WORLD WIDE IMPORTS, GEORGE MICHAEL MOORE, and LANA CHRISTINE ACTY, Defendants herein, did knowingly and unlawfully make use of the service of United Parcel Service, an interstate conveyance, as part of a scheme to sell drug paraphernalia, as defined in 21 U.S.C. § 857(d), which was obtained from Fine-Line Products, Inc., of Milwaukee, Wisconsin.

This is in violation of Title 21, United States Code, Section 857(a)(1).

THE GRAND JURY FURTHER CHARGES:

COUNT 2

That on or about November 8, 1989, in the Southern District of Iowa and elsewhere, POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, and LANA CHRISTINE ACTY, Defendants herein, did knowingly and unlawfully make use of the service of United Parcel Service, an interstate conveyance, as part of a scheme to sell drug paraphernalia, as defined in 21 U.S.C. § 857(d), which was obtained from Fine-Line Products, Inc., of Milwaukee, Wisconsin.

This is in violation of Title 21, United States Code, Section 857(a)(1).

THE GRAND JURY FURTHER CHARGES:

COUNT 3

That on or about the 26th day of January, 1987, up to and including the 28th day of March, 1990, in the Southern District of Iowa and elsewhere, POSTERS' N THINGS

LTD, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY, GEORGE MICHAEL MOORE, and LANA CHRISTINE ACTY, Defendants herein, did willfully and knowingly combine, conspire, confederate, and agree together, and with diverse persons known and unknown to the Grand Jury, to commit an offense against the United States; namely, to knowingly and unlawfully make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia, as defined in 21 U.S.C. § 857(d), in violation of Title 21, United States Code, Section 857(a)(1).

OVERT ACTS

In furtherance of this conspiracy and to effect and accomplish the objects of it, one or more of the conspirators committed the following overt acts:

a. On or about August 17, 1989, the Defendants did cause drug paraphernalia to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of a telephone order placed to Fine-Line Products, Inc., of Milwaukee, Wisconsin, by George Michael Moore on August 15, 1989;

b. On or about November 8, 1989, the Defendants did cause drug paraphernalia to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of a telephone order placed to Fine-Line Products, Inc., of Milwaukee, Wisconsin, by LANA CHRISTINE ACTY on November 6, 1989; and

c. On or about January 11, 1988, the Defendants did cause drug paraphernalia (including Toker II's and Mini-Toker's) to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of an order placed to NALPAC, LTD., of Oak Park, Michigan, by LANA CHRISTINE ACTY on or about January 7, 1988.

This is in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT 4

From on or before the 4th day of November, 1989, up to, and including November 25, 1989, at Des Moines, Polk County, Iowa, in the Southern District of Iowa, the Defendants, LANA C. ACTY, d/b/a POSTERS' N THINGS, d/b/a WORLD WIDE IMPORTS and GEORGE MICHAEL MOORE, d/b/a G. MICHAEL MOORE ENTERPRISES, Defendants herein, did knowingly and intentionally aid and abet Randy Kennedy in the manufacture and distribution of cocaine, a Schedule II controlled substance.

This is in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 5

That on or before the 1st day of February, 1986, up to and including the 28th day of March, 1990, in the Southern District of Iowa and elsewhere, GEORGE MICHAEL MOORE, and LANA CHRISTINE ACTY, Defendants

herein, having received income derived, directly or indirectly, from multiple violations of 21 U.S.C. § 841(a) and 18 U.S.C. § 2, by aiding and abetting other individuals in the manufacture and distribution of cocaine, a Schedule II controlled substance, did invest, directly and indirectly, such income in the acquisition of an interest in the establishment and the operation of the following enterprises:

POSTERS' N THINGS, LTD., d/b/a WORLD WIDE IMPORTS,
d/b/a FORBIDDEN FRUIT

ACTY-MOORE GALLERY

G. MICHAEL MOORE ENTERPRISES

including, but not limited to, the investment of said income in the inventory, equipment, and operating expenses of said enterprises, the activities of which affected interstate commerce.

This is in violation of Title 21, United States Code, Section 854.

THE GRAND JURY FURTHER CHARGES:

COUNT 6

That on or about August 17, 1989, and November 8, 1989, in the Southern District of Iowa and elsewhere, LANA CHRISTINE ACTY, Defendant herein, did knowingly and willfully conduct, and attempt to conduct, financial transactions affecting interstate commerce, to wit, the transfer and exchange of monetary instruments by, through, and to a financial institution, which involved the proceeds of a specified unlawful activity, that is, the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C., § 857(a) and

the aiding and abetting in the manufacture and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, with the intent to promote the carrying on of specified unlawful activity, to wit, violations of 21 U.S.C. §§ 841(a) and 857, and that while conducting or attempting to conduct such financial transactions knew that the property involved in the financial transactions, that is, monetary instruments in the amount of $2,773.33 and $574.09, represented the proceeds of some form of unlawful activity.

This is in violation of Title 18, United States Code, Section 1956(a)(1)(A).

THE GRAND JURY FURTHER CHARGES:

COUNT 7

That on or about March 25, 1989, in the Southern District of Iowa and elsewhere, GEORGE MICHAEL MOORE, and LANA CHRISTINE ACTY, Defendants herein, did knowingly and willfully engage and attempt to engage in a monetary transaction affecting interstate commerce in criminally derived property of a value greater than $10,000, which property was derived from specified unlawful activity, to wit, the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C. § 857(a) and the aiding and abetting of the manufacture and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, that is, the Defendants deposited, withdrew, transferred and exchanged a monetary instrument, to wit, a check written on the account of WORLD WIDE IMPORTS, by, through and to a financial institution, that

is, EAST DES MOINES NATIONAL BANK as is more fully described as follows:

CHECK NUMBER:	14336
DATE:	March 25, 1989
PAYEE:	Karl Chevrolet, Inc.
AMOUNT:	$31,430.59
SIGNATORY:	LANA C. ACTY

This is in violation of Title 18, United States Code, Sections 1957 and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 8

That on or about February 9, 1990, in the Southern District of Iowa and elsewhere, LANA CHRISTINE ACTY, Defendant herein, did knowingly and willfully engage and attempt to engage in a monetary transaction affecting interstate commerce in criminally derived property of a value greater than $10,000, which property was derived from specified unlawful activity, to wit, the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C. § 857(a) and the aiding and abetting of the manufacture and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, that is, the Defendant deposited, withdrew, transferred and exchanged a monetary instrument, to wit, a check written on the account of LANA C. ACTY, by, through and to a financial institution, that is, NORWEST BANK DES MOINES N.A., as is more fully described as follows:

CHECK NUMBER:	3986
DATE:	February 9, 1990
PAYEE:	Dean, Witter, Reynolds, Inc.
AMOUNT:	$100,000.00
SIGNATORY:	LANA C. ACTY

This is in violation of Title 18, United States Code, Sections 1957.

THE GRAND JURY FURTHER CHARGES:

COUNT 9

From an unknown date, but commencing at least as early as January 26, 1987, and continuing up to and including March 28, 1990, in the Southern District of Iowa, and elsewhere, the Defendants, GEORGE MICHAEL MOORE and LANA CHRISTINE ACTY, Defendants herein, did knowingly and willfully combine, conspire, confederate, and agree, with each other and with persons known and unknown to the Grand Jury, to commit an offense against the United States, that is, to violate Title 18, United States Code, Section 1956(a).

It was the purpose and object of this conspiracy to knowingly and willfully conduct and attempt to conduct financial transactions affecting interstate commerce which involved the proceeds of a specified unlawful activity, that is, the use of an interstate facility as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C., § 857(a) and the aiding and abetting of the manufacture and distribution of controlled substances in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, with the intent to promote the carrying on of the specified unlawful activity, and knowing that the transactions were

designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and that while conducting and attempting to conduct such financial transactions knew that the property involved in the financial transaction, that is, funds, represented the proceeds of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a).

OVERT ACTS

In furtherance of this conspiracy and to effect the objects thereof, there were committed, by at least one of the coconspirators herein, in the Southern District of Iowa, at least one of the following overt acts, among others:

a. On or about March 25, 1989, the Defendants engaged in a financial transaction involving a monetary instrument, to wit, a check in the amount of $31,430.59, drawn on the account of WORLD WIDE IMPORTS at EAST DES MOINES NATIONAL BANK, dated March 25, 1989, and payable to Karl Chevrolet, Inc., and conducted or attempted to conduct a financial transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate commerce in any way or degree, by causing the withdrawal, payment, and transfer of funds out of this account by this financial institution;

b. On or about February 9, 1990, the Defendants engaged in a financial transaction involving a monetary instrument, to wit, a check in the amount of $100,000.00 drawn on the account of LANA C. ACTY at NORWEST

BANK DES MOINES, N.A., dated February 9, 1990, and payable to DEAN, WITTER, REYNOLDS, INC., and conducted or attempted to conduct a financial transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate commerce in any way or degree, by causing the withdrawal, payment and transfer of funds out of this account by this financial institution; and

c. On or about September 25, 1988, the Defendants engaged in a financial transaction involving a monetary instrument, to wit, a check in the amount of $45,000.00 drawn on the account of FORBIDDEN FRUIT (POSTERS' N THINGS, LTD.) at EAST DES MOINES NATIONAL BANK, dated September 25, 1988, and payable to LANA C. ACTY, and conducted or attempted to conduct a financial transaction involving the use of a financial institution which is engaged in, or the activities which affect, interstate commerce in any way or degree, by causing the withdrawal, payment and transfer of funds out of this account by this financial institution.

This is in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT 10

Between on or about February 1, 1986, and March 28, 1990, GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, Defendants herein, engaged in conduct in violation of Title 21, United States Code, Sections 841(a)(1), 854, and Title 18, United

States Code, Section 2, each punishable by imprisonment for more than one year, thereby subjecting to forfeiture to the United States the following property and interests:

1. All of the interests and property of GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, Defendants herein, which was used, and intended to be used, in any manner or part to commit or to facilitate the commission of their violations of Title 21, United States Code, Sections 841(a)(1), 854, and Title 18, United States Code, Section 2, including, but not limited to, the following:

a. All of that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 3500 Eula Drive, Urbandale, Iowa;

b. All of the inventory, equipment, and assets of POSTERS' N THINGS, LTD., d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT;

c. All of the inventory, equipment, and assets of ACTY-MOORE GALLERY, including all prints, statues and other art work;

d. All motor vehicles involved in the aforementioned offenses, including:

1) One 1989 red Chevrolet Corvette, VIN 1G1YY3185K5113040, bearing Iowa License Plate UIF001;

2) One 1986 black Mercedes Benz 560SEC M-B, VIN WDBCA45D4GA256819, bearing Iowa license QJK070;

3) One 1986 blue Mercedes Benz 560 SEL, VIN WDBCA39D4GA248742, bearing Iowa License Plate UHJ433;

e. All currency, or its equivalent, currently being held personally or in the accounts of financial institutions in the name of the above-named Defendants which was involved in such offenses;

f. All stocks, bonds, and other securities or commodities held personally or in the accounts of financial institutions in the name of the aforementioned Defendants which was involved in such offenses; and

g. All gold, precious metals, jewelry, or similar investments owned by the aforementioned Defendants which was involved in such offenses.

2. All of the interests and property of GEORGE MICHAEL MOORE, LANA C. ACTY, and POSTERS' N THINGS LTD, Defendants herein, constituting, or derived from, any proceeds that the said Defendants obtained, directly or indirectly, as a result of such violations, including, but not limited to, the interests and property identified in paragraph 1., above.

The aforementioned properties are subject to forfeiture pursuant to Title 21, United States Code, Section 853(a)(1) and (2).

THE GRAND JURY FURTHER CHARGES:

COUNT 11

Between on or about the 26th day of January, 1987, up to and including the 28th day of March, 1990, GEORGE MICHAEL MOORE, LANA C. ACTY, and

POSTERS' N THINGS LTD, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, Defendants herein, engaged in conduct (as specified in Counts 6 through 9, above) in violation of Title 18, United States Code, Sections 1956, 1957, 371, and 2, each punishable by imprisonment for more than one year, thereby subjecting to forfeiture to the United States pursuant to Title 18, United States Code, Section 982, the following property and interests:

All of the Defendants interest in real and personal property involved in such offense, and all property traceable to such property, and subject to forfeiture pursuant to Title 18, United States Code, Section 982, including, but not limited to the following:

1. All of that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 3500 Eula Drive, Urbandale, Iowa;

2. All of the inventory, equipment, and assets of POSTERS' N THINGS, LTD., d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT;

3. All of the inventory, equipment, and assets of ACTY-MOORE GALLERY, including all prints, statues and other art work;

4. All motor vehicles involved in the aforementioned offenses, including:

a. One 1989 red Chevrolet Corvette, VIN 1G1YY3185K5113040, bearing Iowa License Plate UIF001;

b. One 1986 black Mercedes Benz 560SEC M-B, VIN WDBCA45D4GA256819, bearing Iowa license QJK070;

c. One 1986 blue Mercedes Benz 560 SEL, VIN WDBCA39D4GA248742, bearing Iowa License Plate UHJ433;

5. All currency, or its equivalent, currently being held personally or in the accounts of financial institutions in the name of the above-named Defendants which was involved in such offenses;

6. All stocks, bonds, and other securities or commodities held personally or in the accounts of financial institutions in the name of the aforementioned Defendants which was involved in such offenses; and

7. All gold, precious metals, jewelry, or similar investments owned by the aforementioned Defendants which was involved in such offenses.

The aforementioned properties are subject to forfeiture pursuant to Title 18, United States Code, Section 982(a).

A TRUE BILL.

/s/ Charles F. Simon
FOREPERSON

/s/ LINDA R. READE
UNITED STATES ATTORNEY

INSTRUCTION NO. 6

An act is done "knowingly" if the act was done voluntarily, purposely, and understandingly, and not because of mistake, inadvertence, accident or other innocent reason. Knowledge may be proven by a defendant's conduct, and by all the facts and circumstances surrounding the case.

Intent may be established by circumstantial evidence. It rarely can be established by any other means. While eyewitnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. Upon considering all the evidence adduced at trial, the jury may, but is not required to, draw the inference that a person intended all the consequences that one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by that person.

In determining the issue of intent, the jury is entitled to consider all the facts and circumstances in evidence that may aid in determination of the state of mind.

INSTRUCTION NO. 7

Defendant Posters' N Things, Ltd. is a corporation. A corporation may be found guilty of a criminal offense.

A corporation can act only through its agents, which means its directors, officers, employees, and other persons authorized to act for it.

To find a corporate defendant guilty you must find beyond a reasonable doubt that:

1. Each essential element of the crime charged against the corporation was committed by one or more of its agents;

2. In committing those acts, the agent or agents intended, at least in part, to benefit the corporation; and

3. Each act was within the scope of employment of the agent who committed it.

For an act to be within the scope of an agent's employment, it must relate directly to the performance of the agent's general duties for the corporation. It is not necessary that the act itself have been authorized by the corporation.

If an agent was acting within the scope of the agent's employment, the fact that the agent's act was illegal, contrary to the corporation's instructions or against the corporation's policies will not relieve the corporation of responsibility for the act. You may, however, consider the existence of corporate policies and instructions and the diligence of efforts to enforce them in determining whether the agent was acting with intent to benefit the corporation or within the scope of the agent's employment.

If you find that an act of an agent was not committed within the scope of the agent's employment or with intent to benefit the corporation, then you must consider

whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, having full knowledge of the act and acting within the scope of that agent's employment and with the intent to benefit the corporation, approves the act by that agent's words or conduct. A corporation is responsible for any act or omission approved by its agents.

INSTRUCTION NO. 17

Although certain testimony and exhibits received into evidence relate primarily to events that occurred before January 26, 1987, this evidence may be considered by you for the limited purposes I told you about at the time this evidence was received. The testimony and exhibits concerning events that occurred before January 26, 1987, may only be considered by you in connection with the following subjects and specific counts of the Indictment:

1. The alleged "knowledge" of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store, referred to in Counts 1, 2, 3, 6, 7, 8, and 9;

2. The alleged "knowledge" of the defendants as to the use of products, by others to manufacture or distribute controlled substances, referred to in Counts 4 and 5; and

3. The existence of an alleged "agreement" referred to in Counts 3 and 9.

Although you may consider this evidence for these limited purposes, you may not find the defendants guilty of any of the charged offenses unless you find that the "knowledge" has been proved as to each defendant during the time periods alleged in each of the nine counts, and that the "agreement" was in existence during the time periods alleged in Counts 3 and 9 of the Indictment.

INSTRUCTION NO. 18

The testimony of the witness Judd Golden concerning what he told the defendants was received for a limited purpose and should be considered by you only for that limited purpose. Mr. Golden's testimony should be considered by you only in connection with the evidence in this case concerning signs in the store and procedures to be followed by persons selling items in the store. The testimony of the witness Golden may be considered by you as an explanation of those signs and the procedures to be followed by persons in the store. The testimony should not be considered by you for any other purpose.

All three defendants assert as a theory of their defense that each acted in good faith in engaging in the conduct that the government alleges constituted criminal acts and violation of criminal laws. Defendants' good faith defense may be considered by you in connection with the charges in the counts of the Indictment that allege each defendant acted with certain knowledge and intent, as otherwise explained in these instructions on the law.

The defendant Lana Christine Acty and the defendant Posters' N Things Ltd. contend that their good faith is shown by their consultation with attorney Judd Golden. However, as I told you during the presentation of testimony of the witness Judd Golden, the advice of counsel is not a defense to the criminal charges in this case. The testimony of the witness Golden may be considered by you on the question of whether signs in the store and procedures to be followed by persons in the store establish the good faith of the defendants and are inconsistent with the elements in the charges of the Indictment concerning the alleged knowledge of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store, and concerning the knowledge of the defendants as to the use of products by others to manufacture or distribute controlled substances. Whether each defendant acted in good faith and without the knowledge required by the counts of the Indictment are issues for you to determine from all of the evidence in the case.

INSTRUCTION NO. 20

Counts 1 and 2 of the Indictment charge the defendants with violating Section 857(a)(1) of Title 21, United States Code, which provides in part:

> It is unlawful for any person . . . to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia.

INSTRUCTION NO. 21

The crime of the use of an interstate conveyance to sell drug paraphernalia, as charged in Count 1 of the Indictment, has five essential elements, which are:

1. That the items in question constitute drug paraphernalia;

2. That the defendant whose case you are considering knew the nature and character of the items;

3. That the defendant whose case you are considering made use of an interstate conveyance, the United Parcel Service, on or about August 17, 1989;

4. That this use of an interstate conveyance was part of a scheme to sell drug paraphernalia; and

5. That the defendant whose case you are considering made use of the interstate conveyance knowingly as part of a scheme to sell drug paraphernalia.

For you to find the defendant whose case you are considering guilty of the crime of use of an interstate conveyance to sell drug paraphernalia, as charged in Count 1 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant whose case you are considering not guilty of this crime charged under Count 1.

INSTRUCTION NO. 22

The crime of the use of an interstate conveyance to sell drug paraphernalia, as charged in Count 2 of the Indictment, has five essential elements, which are:

1. That the items in question constitute drug paraphernalia;

2. That the defendant whose case you are considering knew the nature and character of the items;

3. That the defendant whose case you are considering made use of an interstate conveyance, the United Parcel Service, on or about November 18, 1989;

4. That this use of an interstate conveyance was part of a scheme to sell drug paraphernalia; and

5. That the defendant whose case you are considering made use of the interstate conveyance knowingly as part of a scheme to sell drug paraphernalia.

For you to find the defendant whose case you are considering guilty of the crime of use of an interstate conveyance to sell drug paraphernalia, as charged in Count 2 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant whose case you are considering not guilty of this crime charged under Count 2.

INSTRUCTION NO. 24

The crime of conspiracy as charged in Count 3 of the Indictment, has five essential elements, which are:

1. Two or more persons reached an agreement or came to an understanding to knowingly make use of the services of an interstate conveyance as part of a scheme to sell drug paraphernalia;

2. The defendant whose case you are considering voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

3. At the time the defendant whose case you are considering was a participant in the agreement or understanding, that defendant knew the purpose of the agreement or understanding;

4. The defendant whose case you are considering was a participant in this agreement or understanding at some time during the period from on or about January 26, 1987 to March 28, 1990; and

5. While the agreement or understanding was in effect, a person or persons who had joined in the agreement knowingly did one or more of the following acts:

(1) On or about August 17, 1989, the defendants did cause drug paraphernalia to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of a telephone order placed to Fine-Line Products, Inc., of Milwaukee, Wisconsin, by George Michael Moore on August 15, 1989;

(2) On or about November 8, 1989, the defendants did cause drug paraphernalia to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of a telephone order placed to Fine-Line Products, Inc., of Milwaukee, Wisconsin, By Lana Christine Acty on or about November 6, 1989; or

(3) On or about January 11, 1988, the defendants did cause drug paraphernalia (including Toker II's and Mini-Toker's) to be shipped and delivered by United Parcel Service, an interstate conveyance, as a result of an order placed to NALPAC, LTD., of Oak Park, Michigan, by Lana Christine Acty on or about January 7, 1988

for the purpose of carrying out or carrying forward the agreement or understanding.

For you to find the defendant whose case you are considering guilty of the crime of conspiracy to knowingly and unlawfully make use of an interstate conveyance as part of a scheme to sell drug paraphernalia as charged in Count 3 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant whose case you are considering not guilty of this crime charged under Count 3.

INSTRUCTION NO. 25

Count 4 of the Indictment charges the defendants with violating Title 18, United States Code, section 2 and Title 21, United States Code, section 841(a)(1).

Title 18, United States Code, section 2, provides:

> Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
>
> Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 21, United States Code, section 841(a)(1) states in part:

> It shall be unlawful for any person knowingly or intentionally to manufacture, distribute, . . . a controlled substance.

Section 802 of Title 21 of the United States Code, provides in part:

> The term "distribute" means to deliver . . . a controlled substance.
>
> The term "deliver" means the actual, constructive or attempted transfer of a controlled substance.
>
> The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by

> means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its containers. . . .

Cocaine is a Schedule II controlled substance under the laws of the United States.

INSTRUCTION NO. 26

The crime of aiding and abetting the manufacture or distribution of cocaine has three essential elements, which are:

1. That on or about the dates November 4 through 25, 1989, Randy Kennedy either intentionally manufactured cocaine or intentionally distributed cocaine;

2. At the time Randy Kennedy manufactured or distributed cocaine, he knew that it was cocaine; and

3. The defendant whose case you are considering aided and abetted Randy Kennedy either in the manufacture or the distribution of cocaine.

For you to find the defendant whose case you are considering guilty of the crime of aiding and abetting Randy Kennedy in the manufacture and distribution of cocaine, as charged in Count 4 of the Indictment, the government must prove all of three essential elements beyond a reasonable doubt; otherwise you must find the defendant whose case you are considering not guilty of this crime charged under Count 4.

INSTRUCTION NO. 27

A defendant may be found guilty of the manufacture or distribution of cocaine even if the defendant did not do every act constituting the offense charged, if the defendant aided and abetted the commission of the manufacture or distribution of cocaine.

In order to have aided and abetted the commission of this offense, the third element listed in Instruction No. 26, the defendant whose case you are considering must, before or at the time the crime was committed:

1. Have known that the crime of the manufacture or distribution of cocaine was being committed or going to be committed by Randy Kennedy; and

2. Have knowingly acted in some way for the purpose of aiding the commission of the manufacture or distribution of cocaine by Randy Kennedy; and

3. Have done so knowingly.

For you to find the defendant whose case you are considering guilty of the manufacture or distribution of cocaine by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of the manufacture or distribution of cocaine were committed by Randy Kennedy and that this defendant aided and abetted the commission of that crime.

INSTRUCTION NO. 31

The crime of laundering of monetary instruments, as charged in Count 6 of the Indictment, has four essential elements, which are:

1. That the defendant whose case you are considering, on or about August 17, 1989, and November 8, 1989, conducted or attempted to conduct financial transactions affecting interstate commerce, to wit, the transfer and exchange of monetary instruments in the amount of $2,773.33 and $574.09;

2. That the transaction involved the proceeds of a specified unlawful activity, to wit, the sale of drug paraphernalia and the aiding and abetting in the manufacture and distribution of a controlled substance;

3. That the defendant whose case you are considering knew the monetary instruments involved represented the proceeds of an unlawful activity; and

4. That the defendant whose case you are considering intended the financial transactions to promote the sale of drug paraphernalia and to aid and abet in the manufacture and distribution of a controlled substance.

For you to find the defendant whose case you are considering guilty of the crime of laundering of monetary instruments as charged in Count 6 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant whose case you are considering not guilty of this crime charged under Count 6.

INSTRUCTION NO. 37

The term "drug paraphernalia" as defined in section 857(d), of Title 21, United States Code, means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body.

The following fifteen sets of items constitute drug paraphernalia:

1. metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
2. water pipes;
3. carburetion tubes and devices;
4. smoking and carburetion masks;
5. roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
6. miniature spoons with level capacities of one-tenth cubic centimeter or less;
7. chamber pipes;
8. carburetor pipes;

9. electric pipes;
10. air-driven pipes;
11. chillums;
12. bongs;
13. ice pipes or chillers;
14. wired cigarette papers; or
15. cocaine freebase kits.

Even if an item does not appear on this list, that item may still constitute drug paraphernalia for purposes of Section 857. In determining whether such an item constitutes drug paraphernalia, in addition to all other logically relevant factors, you may consider the following:

1. instructions, oral or written, provided with the item concerning its use;
2. descriptive materials accompanying the item which explain or depict its use;
3. national and local advertising concerning its use;
4. the manner in which the item is displayed for sale;
5. whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
6. direct or circumstantial evidence of the ratio of sales of the items to the total sales of the business enterprise;

7. the existence and scope of legitimate uses of the item in the community; and
8. expert testimony concerning its use.

INSTRUCTION NO. 38

An item does not constitute drug paraphernalia, however, if that item, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and is traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

For you to find the defendant guilty of the crimes alleged in Counts 1 and 2, the government must prove all of the essential elements beyond a reasonable doubt, including that the items in question were drug paraphernalia, and were not traditionally intended for use with tobacco products.

INSTRUCTION NO. 39

The term "primarily intended," as used in these instructions, does not relate to the knowledge or intent of any particular person or persons. Rather, it is for you to determine the primarily intended use of any item by considering these instructions and all logically relevant factors.

INSTRUCTION NO. 47

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense is an agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy.

However, the evidence need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their purpose was or how they would accomplish their purpose. What the evidence must show beyond a reasonable doubt, in order to prove that a conspiracy existed, is that the members in some way came to a mutual understanding to try to accomplish a common and unlawful plan.

Thus, your first task is to decide whether the government has proved beyond a reasonable doubt that the conspiracies alleged in Counts 3 and 9 existed. If you find that the government has proved that either conspiracy existed, you should next decide whether the government has proved beyond a reasonable doubt that the defendant whose case you are considering willfully became a member of that conspiracy.

If the government has proved beyond a reasonable doubt that the conspiracy under consideration was willfully formed, and that the defendant whose case you are considering willfully became a member of that conspiracy, either at its inception or any time prior to its termination, then you should return a guilty verdict against that defendant even though the conspirators may have failed to accomplish their common object or purpose.

INSTRUCTION NO. 47A

In determining the existence and purpose of the agreements or understandings referred to in Count 3 and in Count 9, you should consider the primary definition of drug paraphernalia previously given you in explaining Counts 1 and 2. You may not consider any items to be part of a scheme to sell drug paraphernalia unless the government has proven beyond a reasonable doubt that the items in question were drug paraphernalia as defined in these instructions.

You may not consider items to constitute drug paraphernalia if the government has not proven the items to be drug paraphernalia in accordance with the definition applicable to that period of time.

For the time period of January 24, 1987 to November 18, 1988, an item did not constitute drug paraphernalia if that item, in the normal lawful course of business, was imported, exported, transported, or sold through the mail or by any other means, and was primarily intended or designed for use with tobacco products, including any

pipe, paper, or accessory by the manufacturer or seller thereof.

For the time period November 18, 1988 to March 28, 1990, an item did not constitute drug paraphernalia if that item, in the normal lawful course of business, was imported, exported, transported, or sold through the mail or by any other means, and was traditionally intended or designed for use with tobacco products, including any pipe, paper, or accessory by the manufacturer or seller thereof.

INSTRUCTION NO. 48

A person may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in any way which helps carry out the conspiracy, is not a conspirator.

Before you may find that the defendant whose case you are considering or any other person has become a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy under consideration was knowingly formed, and that the defendant, or other persons alleged to have been members, willfully participated in an unlawful plan, with the intent to help carry out that conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, that is to say, to

act or participate with a bad purpose to disobey the law. So if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of carrying out the plan, he thereby becomes a willful participant – a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators of the conspiracy.

In deciding whether a conspiracy existed, you should consider the actions and declarations of all of the alleged participants. However, in determining whether the defendant whose case you are considering was a member of that conspiracy, you should consider only that person's acts and statements. You should understand that merely being present at the scene of an event does not prove that a person has joined in an agreement or understanding.

GOVERNMENT EXHIBIT 85 P. 90-33

5th YEAR ANNIVERSARY SALE ENDS JAN.1st 1981

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TERMS-COD CASH OR CERT. CHECK
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ALL ITEMS SOLD FOR LEGAL USE

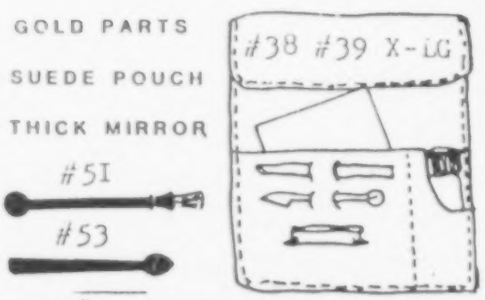
PSEUDOCAINE! The Best Selling Incense in the U.S.!!

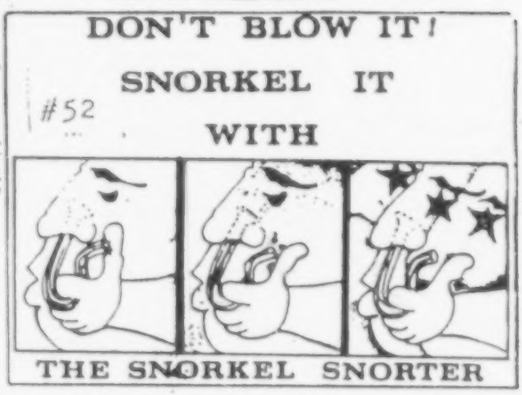
PSEUDO CAINE INCENSE. HOTTEST SELLING ITEM IN U.S. MADE FROM THE QAT PLANT. SIMILAR TO THE COCO PLANT.
1. $30 1.5gr. BOTTLE $6
2. $100 5gr. BOTTLE $15

NITROUS OXIDE
14. $10 INFLATOR $2.75
15. $12 ADJ. INFLATOR $3.75
16. $1 HEAVY BALLON $4.20/doz.
17. $7 BOX NITROUS $3
18. CASE OF 36 BOXES $95
19. 6 CASES OR MORE $90

N2O CARTRIDGES

GOLD PARTS
SUEDE POUCH
THICK MIRROR





MANNITE
BLUE LADY WHITE STUFF
3. $6 8.5gr. BAR 75¢
4. $18 22.5 BAR $2.50
5. $20 1oz. BOTTLE $4.50

LEGAL STIMULANTS. THEY LOOK & ACT LIKE BLACKS, YELLOWS, CROSSES ETC. PACKED 1,000 TO A BOTTLE
$200 to $600 RETAIL
20. 1 to 5 BOTTLES $60
21. 6 & UP $50

SNOW ITEMS
36. $6 PLASTIC BULLET SNORTER $1.25
37. $5 MINI COKE KIT $1.95
38. $8 SUEDE COKE KIT GOLD PARTS $2.95
39. $12 1g. SUEDE COKE KIT GOLD PARTS $4
40. $16 1g. LEATHER COKE KIT AGATE $5.95
41. $5 LINE UP COKE KIT $1.85
42. $2.50 SNO SEALS $11/doz.
43. $3 COKE SPOONS $11/doz. asst.
44. $2 HEAVY GOLD BLADE $7.50/doz.
45. $6 SCREEN 2 $2.25 PACKED 6
46. $11 D HYDRO BOTTLE $4
47. $17.50 D BULLET $6.25
48. $1 GLASS SNORTER $4 doz.
49. $6 DRY ICE $2.25
50. $2 SCREW ON FUNNEL CAP $8/doz.
51. $4 GLASS CLEAN & SWEEP SET $15/12
52. $3 SNORKEL SNORTER $11/12
53. 75¢ SNO SPOONS $5/25
54. $30 DEERING PREF $12.50
55. $8 GLASS FREE BASE PIPE $2.95
56. $12 GLASS F.B. PIPE DETACHABLE BOWL $4.50
57. $3 GOLD KNIFE SPOON $6/doz.
58. $3 GOLD SNORTER $6/doz.

1OZ. BOTTLE

CRYSTAL
6. $25 1oz. BOTTLE $4.75
7. $300 1 lb. BOTTLE $30

MANNITOL 1 POUND JAR!!
REG. $40.00
NOW ONLY $20.00

MANNITOL
8. $10 1oz. SUPERIOR CUT $3
9. $20 1oz. BOTTLE $4.50
10. $200 1 lb. BOTTLE $20

BUTYL NITRITE
22. $10 LOCKER ROOM $1

PROCAINE & BENZOCAINE
23. $5 PROCRYSTAL 1gr. $1.60
24. $20 COCO LEAF 3gr. $3.50
25. $100 PURE PROCAINE $15 1/2oz.
26. $100 PURE BENZOCAINE $15 1/2oz.
#23 & 24 ARE MADE OUT OF PROCAINE OR BENZOCAINE & MANNITE.

INOSITOL
(A VITAMIN POWDER)

B INOSITOL FOWDER
11. $5 2oz. BOTTLE $4
12. $125 4oz. BOTTLE $12
13. $400 1 lb. BOTTLE $40

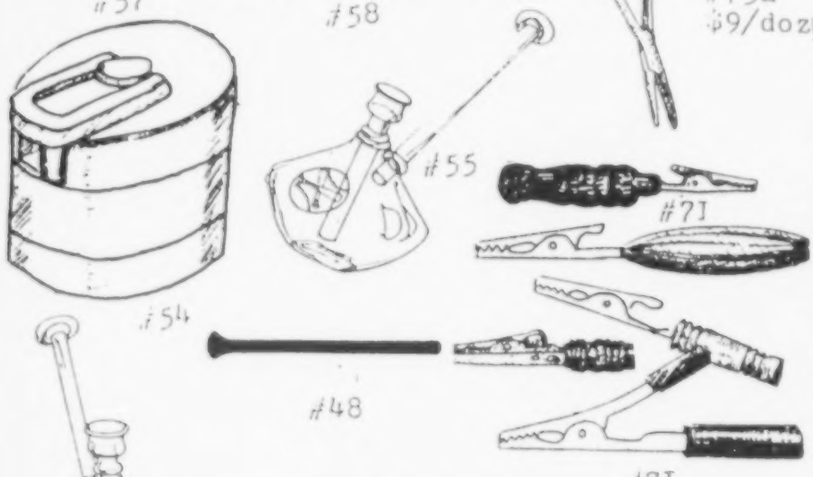
FREE BASE ITEMS
SNOW TOKER-TECH-CHEMIST
27. $10 8oz. ETHER $2.25
28. $10 8oz. SOLVENT 2 $3.25
29. $5 2oz. SOLVENT 2 $2
30. $3.50 2oz. BASE SOLUTION $1.10
31. $3.50 2oz. AMONIA SOLUTION $1.10
32. $15 CHEMIST FREE BASE KIT $5.25
33. $14 SNOW TOKER FREE BASE KIT $4.50

FREE BASE TORCH
34. $20 TORCH $7.50
35. $2.50 CYLINDERS $2.50/3

36

PRICES ON OTHER SIDE

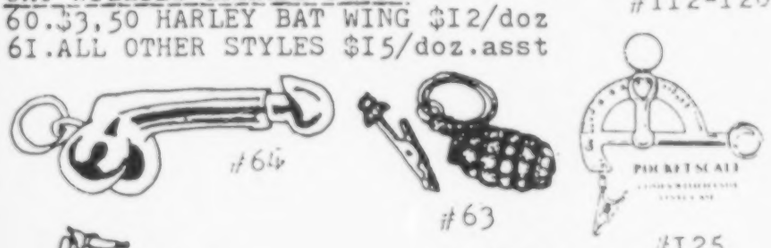
GOLD SPOON GOLD STRAW

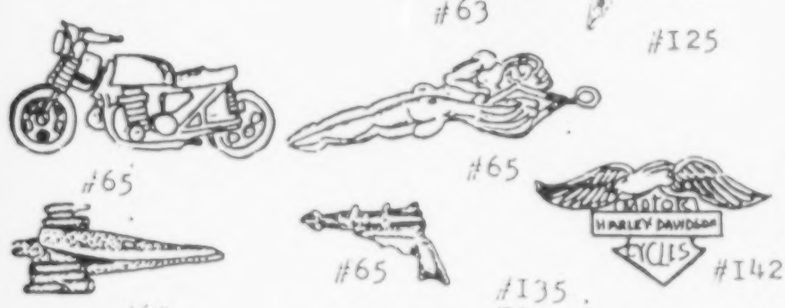


Changeable Bowls And Stems

HARLEY-DAVIDSON COKE MIRRORS

CAT WILLIES HARLEY MIRRORS
59.$22 MIRRORS $7.50 asst.
CAT WILLIES ENAMEL CLIPS
60.$3,50 HARLEY BAT WING $12/doz
61.ALL OTHER STYLES $15/doz.asst





HIDDEN CLIPS
62.$5 UP YOUR ASS FINGER $2
63.$5 GRENADE $2
64.$5 DICK $2
65.ALL OTHER $5 HIDDEN CLIPS & CAST CLIPS.gun,motercycle,car,lovers, lg.helping hand,screw,spark plug etc.$12/doz.asst.

MISC.CLIPS
66.$6 HEMOSTATS $2.25
67.$5 FAT KEY CLIP $9/doz.
68.$5 SWITCH BLADE $2
69.$3 EXTENDO CLIP $1.25
70.$5 EXTENDO CLIP $2
71.75¢ BASIC CLIPS $3/doz.asst.
72.$3 CAST ASST.STYLE HARLEY CLIPS $
73.$1 BASIC CLIPS $4/doz.asst.
74.$2 BASIC CLIPS $8/doz.asst.
75.$3 BASIC CLIPS $12/doz.asst.

INCENSE
$1.75 GONESH STICK $7.50 a doz.
76.#2 77.#4 78.#6
79.#8 80.#10 81.#12
$1 OLFACTORY STICK $4.50 a doz.
82.CHEERY 83.PUSSY 84.STRAWBERRY
85.HERBAL 86.CINNAMON 87.COCONU
88.A.VIOLET 89.RAIN.SAMPLER
90.PATCHOULI 91.B.RASPBERRY
92.JASMINE 93.SANDELWOOD 94.FRANCEN

SPRAYS
95.$4 OZIUM $16.50/doz.

TESTERS
96.$2.50 POT $12/doz.
97.$3 COKE $15/doz.

CLEANERS
98.$7 MARYGIN $18.50/6
99.$7 SHAKER $18/6
100.J'S STRAWBERRY 50¢24

PAPERS
101.CLUB $9.60/60
102.JOKER $6/25
103.EZ WIDER $4.50/25
104.EZ WIDER 1¼ $4.25/24
105.EZ WIDER 1½ $4.25/24
106.MARFIL ARROZ RICE $9.50/100
107.BIG BAMBU $9/50
108.ZIG ZAG FRENCH $4.50/25
109.ZIG ZAG KTCNR FREE $4.50/25
110.ZIG ZAG KTCNR SLOW $4.50/25
111.ZIG ZAG WHITE $4.25/24

ROLLERS RIZLA
112.$1.50 SUPER EXPREES $6.75/10
113.$2 CADET $9/12
114.$3 DWIDE CADET $10.75/10
115.$6 LUXURY $22.50/10
116.$7 DWIDE LUXURY $24.50/10
117.$8 PRESENTATION $28/10
118.$3 MINI MAXI $11.25/10
119.$2 EZ WIDER $10/12
120.$2.50 ZIPPY $12/20

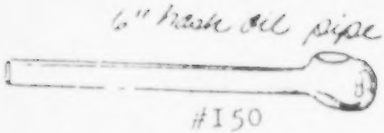
TRAYS
121.$3.50 sm.CLUB TRAYS $1.50
122.$3.50 sm.DESIGN TRAYS $1.50
123.$8 PHOTO TRAYS lg.$3.75
124.$8 LG.CLUB TRAY $3.75

SCALES
125.$2 POCKET SCALES $5.25/doz.
126.OHAUS TRIPLE BEAM ASK
127.OHAUS DIAL GRAM $125
128.$22 COUNTER BALANCE $9.50
129.PORTABEAM CASE $11.50
130.SUPER SCOOP $5.99
131.$12 2gr.SCALE LIKE DEERING $4
132.$15 2gr.DEERING $5.25

ISO MACHINE
133.$140 ISO $95

HOT SELLING ITEMS
134.$4 BABYWOOD ROSE SEEDS $1.50/20
135.50¢ LEAF DECAL $2.25/doz.
136.$2 LEAF CASE GOLD OR SILVER $9/d
137.$1 LEAF FINS $4.25/doz.GOLD OR S
138.$2 LEAF EARRINGS $6/doz.GOLD OR
139.$3 LEAF NECKLACES $11/doz.G OR S
140.$1 lg.HIGH MATCHES $4/doz.
141.50¢ lg.BLACK STASH BAGS $20/100
142.$7 HARLEY CAST NECKLACES $2.50
143.$4 LEATHER LEAF CLIPS $1.50

VIALS
144.75¢ 5/8 CLEAR $2.10/doz.$20/144
145.75¢ 5/8 AMBER $2.10/doz.$20/144
146.$1 1dram CLEAR $2.25/doz.$21/144
147.$1 1dram AMBER $2.25/doz.$21/144
148.$2 5/8 AMBER W/SPOON $9/doz.
149.$2 1dram W/SPOON $9/doz.AMBER



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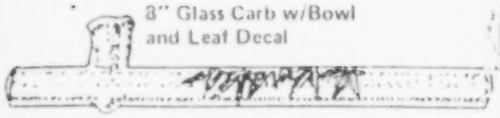

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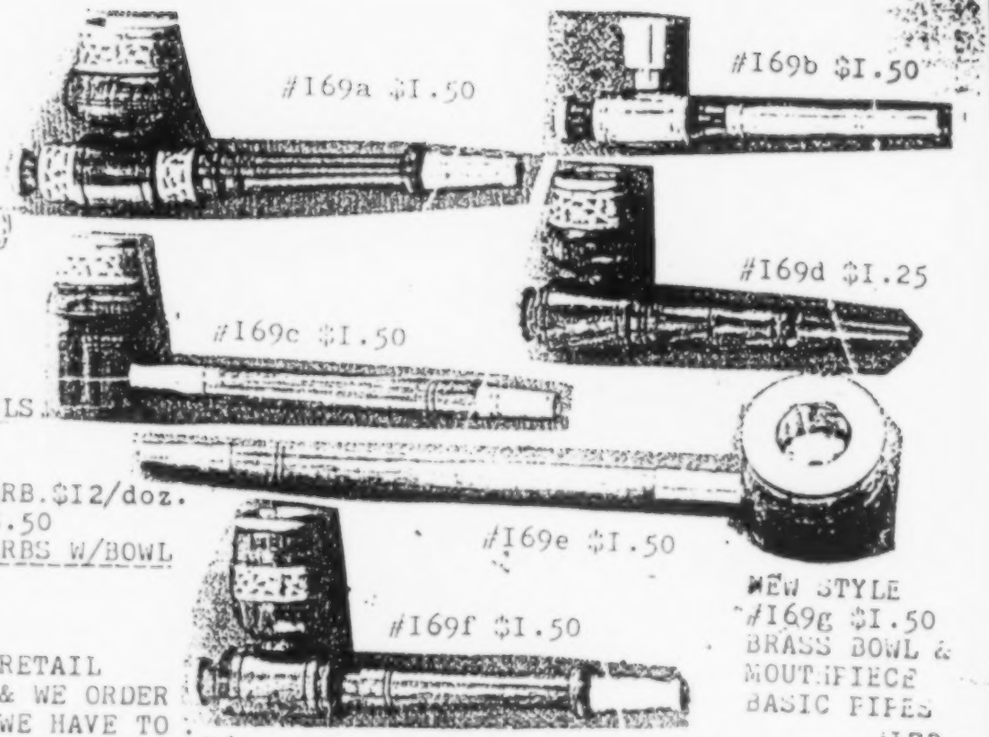
GLASS OIL PIPES
I50.$I STRAIGHT $4.50/doz.
I5I.$I.50 CURVE $6.50/doz.
DECAL LEAF GLASS CARBS W/BOWLS
I52.$3.25 4" $I5/doz.
I53.$3.80 6" $I8/doz.
I54.$3.50 6" JOINT HOLDER CARB.$I2/doz.
I55.$I9.50 XL STEAMROLLER $8.50
TOKER-ODYSSEY DECAL GLASS CARBS W/BOWL
I56.$3.50 4" $I8/doz.
I57.$4.25 8" $2I/doz.
I58.$5 I2" $22/doz.
OUR BEST BUYS ARE PIPES.OUR RETAIL STORE SHOWS OVER 300 STYLES & WE ORDER NEW & HOT STYLES EVERY WEEK.WE HAVE TO ORDER LARGE QUANTITIES TO GET THE BEST PRICE & WE WILL START BLOWING OUT ALL OUR EXCESS EVERY WEEK CLOSE TO OUR COST WE WILL SELL THEM IN ASSORTMENTS & WE WILL GUARANTEE EVERY ASSORTMENT.

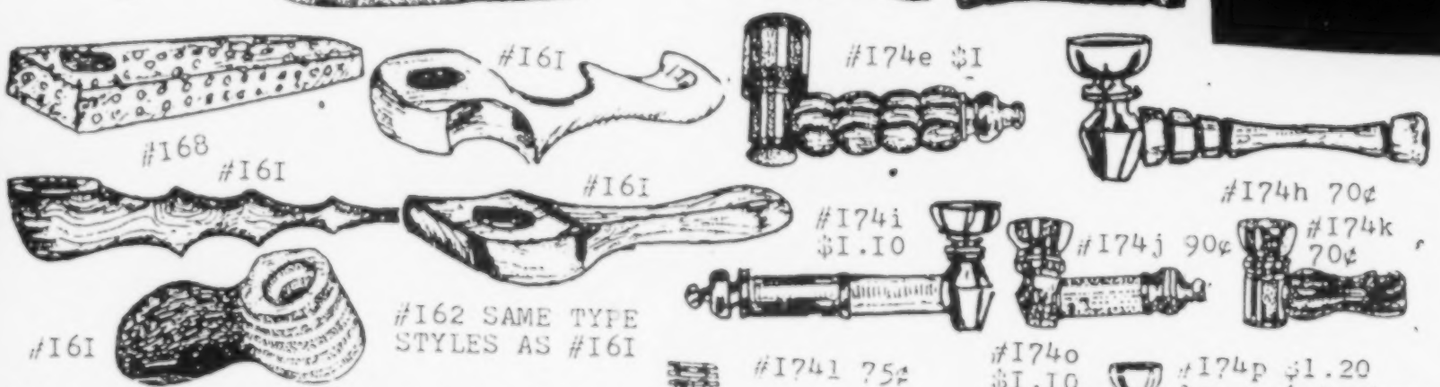


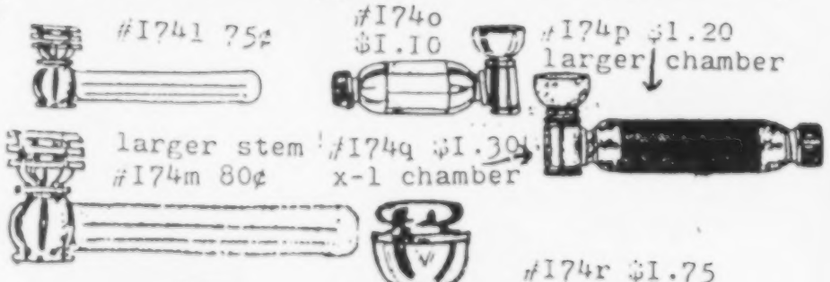
NEW STYLE
#I69g $I.50
BRASS BOWL & MOUTHPIECE BASIC PIPES

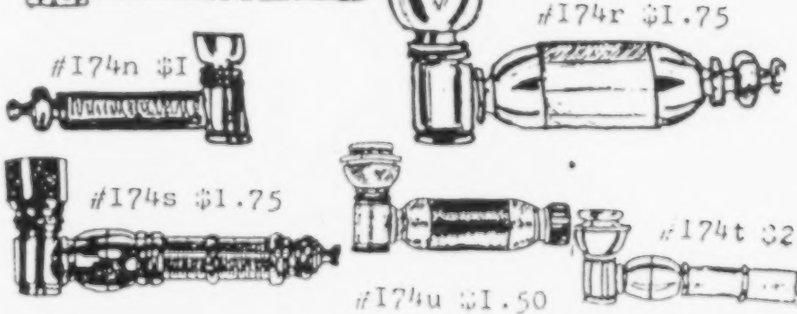
I69.SHEESHAM WOOD & BRASS PIPES ONE OF OUR HOTTEST SELLERS.8 STYLES TO $6 RETAIL. $I.50 OR ORDER BY STYLE #
I70.BASIC PIPES TO $3 RETAIL.20 STYLES RAINBOWS,WOODS,PLASTIC ETC. $I8/24
I7I.BASIC PIPES W/METAL MOUTH PIECES TO $5 RETAIL I8 STYLES $24/24
I72.BASIC PIPES W/METAL M.P.& METAL BO'L W/CAP TO $6 RETAIL I7 STYLES $30/24
I73.BASIC PIPES WITH METAL CHAMBERS TO $7 RETAIL I9 STYLES $36/24
I74.BASIC PIPES WITH METAL CHAMBERS & METAL BOWL/CAP 9STYLES TO $8 $42/24
ALL PIPES COME ASSORTED WOOD OR METAL BOWLS.

#I70 to #I74 ASST. OR PICK YOUR OWN STYLES BELOW. THESE ARE SOME OF THE STYLES IN ASST.

FANCY INLAID PIPES





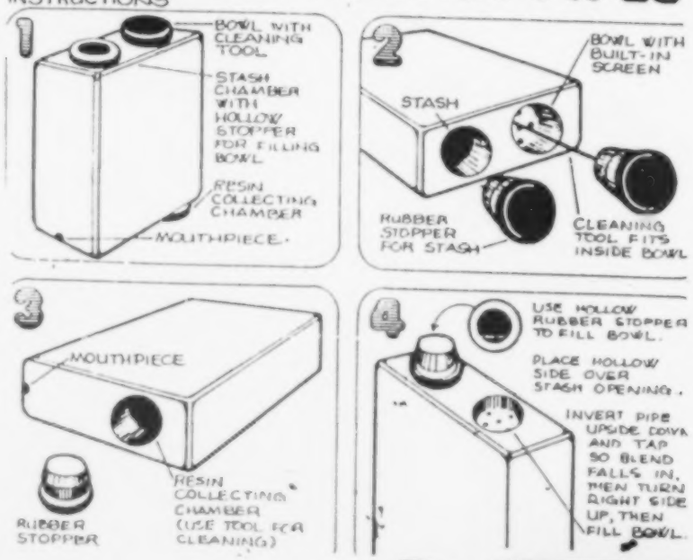


I59.$5 WOOD PIPE W/TURQUOISE INLAY HOT SELLERS 4 STYLES $I.90
I60.$3.50 CANDY STRIPES WOOD PIPES. HOT SELLERS I2 STYLES $I.95
6I.ROSEWOOD PIPES $4 TO $8 RETAIL II STYLES $I.50
62.EBONY PIPES $4 TO $I0 RETAIL 5 STYLES $I.95
63.BRASS OR PEARL INLAY WOOD PIPES I2 STYLES UP TO $8 RETAIL $I.50
64.SOAPSTONE INLAYS TO $7 RETAIL I0 STYLES $I.50
65.OVAL WOOD LEAF DESIGN PIPES 4 STYLES TO $7 RETAIL $2.25
66.$8 lg.BLACK THAI PIPE $2.25
67.$I8 XL BLACK THAI PIPE $7.75
68.$8 FANCY DESIGN WOOD PIPES I2 STYLES $2 HOT SELLERS

175.$3 PINCH HITTERS $16/doz.
176.$12 PINCH HITTER DUG OUT $5.95
177.$4 ZEPPELIN SLUGGER $17/24
178.$3 CONCERT KIT $12/doz.
179.$5 GRASS MASK $2
180.$12 HIGH TECH W/LIGHTER $4.50
181.$4 HANDY HI $15/doz.
182.$3 BIG HIT $1.20
183.$4 POWER HITTER $1.50
184.$3.50 PIPE DREAM $1.50
185.$4 PIPE DREAM $1.70
186.$5 PIPE DREAM $1.90
187.$6 SNEAKY TEAK $2.25
188.$7.50 SNEAKY TEAK $3
189.$10 SNEAKY TEAK $4
190.$12.50 SNEAKY TEAK $5
191.$3 DEALER SM.$28/24
192.$3.50 DEALER MED. $34/24
193.$4 lg.DEALER $38/24

HANDY-HI POCKET PIPES

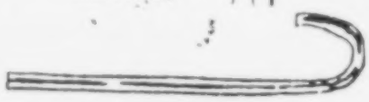
INSTRUCTIONS

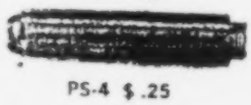


A3
30¢

B7
40¢

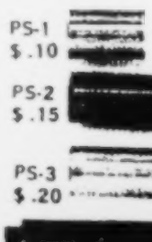
FOSTERS
194.ALL OUR $2.50 TO $4 ROCK,DRUG ETC. FOSTERS.DISPLAY BOX OF 100 ONLY $75




PS-4 $.25

B1 FEMALE
25¢

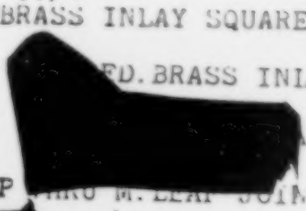
BLACK MARKET T-SHIRTS REG.$39 A DOZ..
195.M,L,XL ASST.SIZES & DESIGNS $30/doz
DESIGNS ON #195 T-SHIRTS.MIDNIGHT TOKER MARY JANE,HASHISH,OPIUM,MUSHROOMS,HARLEY POT HEAD,PERUVIAN,WANNA FUCK,SIT ON FACE

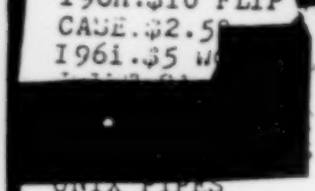

PS-1 $.10
PS-2 $.15
PS-3 $.20
PS-6 $.30
PS-5 $.25

SUPER CLOSE OUT.WOOD OR WOOD BRASS INLAY BOXES TO $8 RETAIL

196a.$3.50 sm.ROUND BOX.FANCY INLAY DESIGN.75¢
196b.$4 sm.TALL ROUND BOX WITH SMALLER BOX INSIDE.$1
196c.$4 ASST.SHAPES PLAIN WOOD BOX,DIAMOND,OVAL,HEART ETC.$6/6
196d.$5 SAME AS ABOVE BUT HAS M. LEAF INLAY.$9/6
196e.$5 med.BRASS INLAY SQUARE BOX.$9/6
196f.$6 FLIP [illegible]ED.BRASS INLAY BOX.$2
196g.$8 FLIP [illegible]Y BOX.$2.25
196h.$10 FLIP [illegible] M. LEAF INLAY CASE.$2.5[illegible]
196i.$5 W[illegible]AIN OR DESIGN sm.
[illegible] AS ABOVE $2.50 med.
[illegible] ABOVE LG. $3

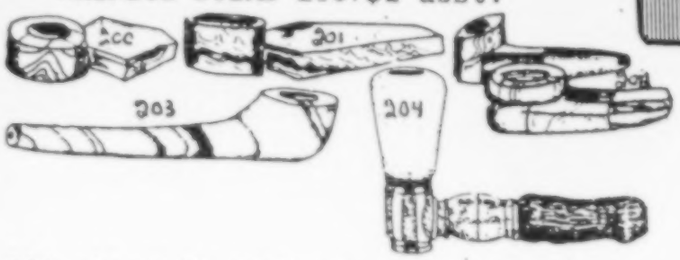
B 196I TO 196K



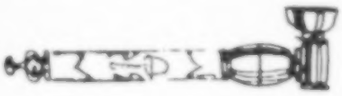


#196H

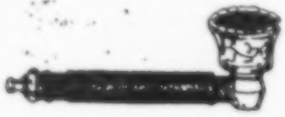
ONYX PIPES
200.$2 RETAIL $10/doz.asst.
201.$3 RETAIL $14/doz.asst.
202.$4 RETAIL $18/doz.asst.
203.$5 RETAIL $24/doz.asst.
204.UP TO $9 RETAIL ONYX BOWLS WOOD. RAINBOW STEMS ETC.$2 asst.


200
201
203
204

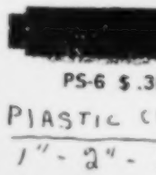
205a.$1 HIGH XMAS CARDS $5/12
206.$5 TOY PANDA BEARS $1.25
BONGS-ASK WHATS IN STOCK
208.$1 RAINBOW DECAL $4.50doz.
209.$2 RAINBOW DECAL $9/doz.
210.ASST.LEAF STEM LEATHER PIPES.TO $8 RETAIL $3.50
211.ASST.LEAF STEM PLASTIC PIPES TO $7 RETAIL $2.50
212.$12 REAL CHICKEN FOOT PIPE.$4.50



213.$4 FANCY BOWL PIPES..$1.75

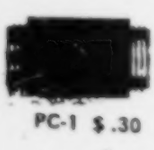


PLASTIC Chambers
1" - 2" - 3 inch


RB2
15¢

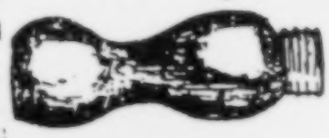
B6
15¢

MIB 20¢


PC-1 $.30
PC-2" 40¢
PC-3" 60¢

S-11 Wood 15¢

B13
25¢


S10 25¢

S7 15¢

Four Bead Sleeve
S3 30¢

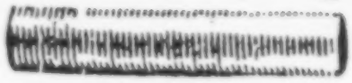
Onyx Bowls
OB-80¢

C2
10¢

S1 35¢

SC3
40¢

Nipples
N1-20¢



C3
10¢

SCREENS
S1..750 $9/1,000
S2..812 $10/1,000
S3.1.00 $14/1,000

C4
10¢

JULY Ist LOWEST PRICES IN U.S.LOWEST PRICES IN U.S.LOWEST PRICES IN U.S.

ALL $I0 RETAIL ½oz.BOTTLES

B-TRONS

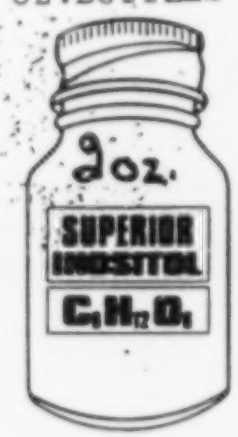
[redacted]

2.$2.50 3.$2.50 4.$2.50 5.$2.50 6.$2.50 7.$2.50 8.$2.50
7/I2 $27/I2 $27/I2 $27/I2 $27/I2 $27/I2 $27/I2

2 oz.BOTTLES-$30 RETAIL.

$I8 RETAIL

TAL



$6 RETAIL

9.$2.50 I0.$2.50 II.$8 I2.$8 I3.$8 I4.$2.50 I5.$I
$27/I2 $27/I2 $84/I2 $84/I2 $84/I2 $95/40 $95/I00

I6bb.SUPERIOR
CAINE ROCK
ALSO ½oz.$20

I6.2gr.$2.50 I6a.2gr.$3 I6b.2gr.$3 I9.I½gr.$4.20
I7.5gr,$6.50 I7a.5gr.$7.50 I7b.5gr.$7.50 20.5gr.$I0.50
I8.Ioz.$35 I8a.Ioz.$40 I8b.Ioz.$40 2I.Ioz.$56

#22-$5.4C
SCORE BY
DIAMOND
CRYSTAL
THEY QUIT
MAKING.
WE THINK
THE BEST
INCENSE
OUT
22a.Ilb.
$800

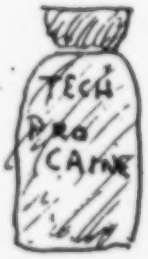
CALL TOLL FREE MON.-TO SAT.I0-8 CENTRAL TIME
SUN.I2 TO 4-FOB DES MOINES IOWA-
REPORT BROKEN MERCHANDISE TO UPS
QUANTITY PRICES ON REQUEST**********

THEY QUIT MAKING THE HOTTEST
SELLING ITEM IN U.S.WE STILL
HAVE STOCK.CALL FOR DETAILS*
****

2.Ioz.$I.75
3.4oz.$3.50
4.8oz.$6.50
5.I6oz.$I2

36.½oz.$2.25
37.Ioz.$4.50
38.2oz.$7.00
39.4oz.$9.00
40.8oz.$I5
4I.I6oz.$25

42.½oz.$6
43.4oz.$20
44.8oz.$40
45.I6oz.$60

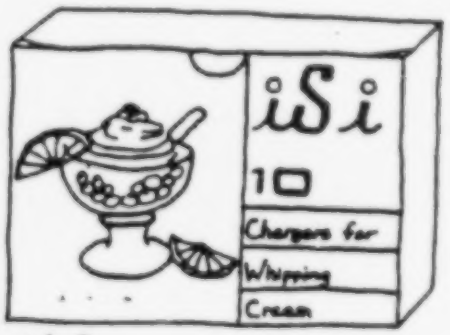


46.½oz.$3
47.Ioz.$5
48.4oz.$8
49.8oz.$I5

50.½oz.$3
5I.4oz.$8
52.8oz.$I5
53.I6oz.$25

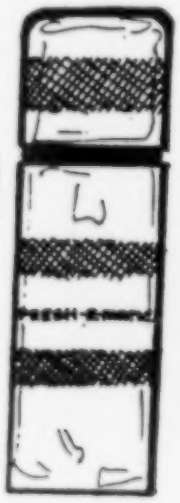
$10 RETAIL-$2.50
3I.ROCKCRYSTAL
$5 RETAIL-$I

54.2gr.$3
55.4gr.$6
56.½oz.$2I

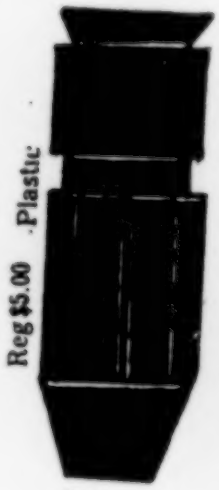


N_2O

57.BOX OF I0 $3.50
58.36 BOXES $99



59.$2.50



60.$2.50

PUNCH BALLS
$35.00 per 100

6I.40¢EACH
62.$35/I00

NEW
MIRACLE CURE ALL SOLVENT
4OZ.
BOTTLE

63.$3
64.$60/24

HEAVY CAST HARLEY NECKLACES TO $I0 RETAIL
8 DESIGNS IN SILVER & GOLD
65.$2 EACH ASST.

NEW!
GOLD BOND SOLVENT
8 OZ. BOTTLE
$6.00 ea.

FASTER DRYING

VIALS
76.SHORT CLEAR $3/I2-$2I/I44
77.SHORT AMBER $3/I2-$2I/I44
78.TALL CLEAR $3/I2-$2I/I44
79.TALL AMBER $3/I2-$2I/I44
80.WITH SPOON 89¢

TOKER ITEMS**********
$6 GOLD SOLVENT $5-$48/I2
$5 SILVER SOLVENT $4-$36/I2
$2 BASE SOLUTION $I.50-$24/24
$2 AMMONIA SOLUTION $I.50-$24/24
$4 ETHER $3-$30/I2
$8 FREE B.KIT $5.25-$54/I2
$I3 SUEDE FREE B.KIT W/PIPE $8
$I SHAKER VIALS $8/I2
I5¢ EYE DROPPERS $3/I2
.BASE SCREENS-ASK**********

SPECIALS**********
8I.$5.50 D HYDRO BOTTLE $2.69
82.$8.75 D BULLET $5.50
83.$I5 DEERING PREP $I2
84.$9 DERRING GR.SCALE $7.50
85.$I.25 SNO SEALS $II/I2
86.GOLD BLADE $9/I2
87.LG.MIRRORS TO $20-$8
88.MED.MIRRORS TO $I5-$5
89.SM.MIRRORS TO $I0-$2.50
90.AUSTRIAN ORIGINAL SNOW PEN I-REG.$I5 NOW $3.50
9I.ALPINE MIST REG.$5 NOW 99¢
92.$6 SUEDE SNUFF KIT $3.99
93.25 LBS BULK MANNITE $I99
94.$3 BULLET SNORTERS 99¢
95.GOLD CHOPPER SPOON $9/I2
96.GOLD TOOTER $9/I2
97.SCREEN Z $2.50

LAST CHANCE TO STOCK UP BEFORE PRICE INCREASE.SALE ENDS FEB.1st.ORDERS OF 100 BOTTLES OR MORE CALL MORNINGS FOR PRICE.MM SALES 3500 EULA DRIVE URBANDALE IA. 50322-MORNINGS 515-276-2705.SEND COMPLETE PAYMENT BY POSTAL MONEY ORDER.ADD $1 PER ITEM FREIGHT.SEND SELF ADDRESSED STAMPED ENVELOPE JAN.31st IF YOU WANT OUR NEXT PRICE LIST OR CALL.

CAPSULES-BOTTLES 1,000

YELLOW		BLACK		BLACK		BLACK		PINK		BOTTLES OF 100	
18-985	$30	18-845	$30	895	$30	18-875	$50	97209-63	$30	BLACK	
18-906	$30	RUS	$30	DEX	$35	CLEARS				18-985	$10
RUS	$30	18-985	$30	127	$35	BROWN	$30	BOTTLES OF 100		127	$10
RJS	$30	18-789	$30	335	$35	BLUE	$35	YELLOW RUS	$10	RUS	$10
10-984	$30	RJS	$30	355	$50	WHITE	$35	YELLOW 18-906	$10	18-789	$10
RJ8	$35	10-845	$30	MOLE	$50	GREEN	$35	YELLOW RJ8	$10	RJS	$10

TABLETS-BOTTLES 1,000

PINK HEART	$25	WHITE CROSS THIN	$20	WHITE/BLUE EGG	$25	BOTTLES OF 100	
PINK FOOTBALL	$25	WHITE CROSS THICK	$20	BLUE/BLUE EGG	$25	WHITE/BLUE EGG	$10
PINK DEX	$25	WHITE CROSS 2 WAY	$23	WHITE/GREEN EGG	$25	BLUE/BLUE EGG	$10
ORANGE BT 72	$25	WHITE CROSS 3 WAY	$25	WHITE/BLUE LG."	$25	PINK HEART	$10
ORANGE DEX	$25	GREEN DEX	$25	BLUE/BLUE LG.""	$25		

SLEEP AIDS-BOTTLES 1,000

714 $35 BLUE # 10 $25

STRONGER LENNON 714 $50 YELLOW 122 $25

WHITE POWDER INCENSE SALE-40% OFF RETAIL

RETAIL	40% OFF
$12 1½gr.PSEUDOCAINE	$7.20
$30 5gr. PSEUDOCAINE	$18
$160 1oz.PSEUDOCAINE	$96
$12 2gr.SUPERIORCAINE	$7.20
$30 5gr.SUPERIORCAINE	$18
$160 1oz.SUPERIORCAINE	$96
$12 2gr.SCORE	$7.20
$160 1oz.SCORE	$96
$12 2gr.MILKY TRAILS	$7.20
$24 4gr.MILKY TRAILS	$14.40
$70 ½oz.MILKY TRAILS	$42
$10 1gr.SUPERCAINE	$6
$12 2.75gr.TOOT	$7.20
$10 1½gr.SUPERTOOT	$6
$10 1gr.ULTRACAINE	$6
$10 3gr.COCO LEAF	$6
$5 PRO CRYSTAL	$3
$10 PRO CRYSTAL 2	$6
$5 ROCK CRYSTAL	$3
$6 RUSH OR LOCKERROOM	$3.60
NATURAL ORGANIC ITEMS	
$12 ZOOM STIMULANT	$7.20
$8 SPIRULINA STIMULANT	$4.80
$12 RELAX-U TRANQUILIZER	$7
SM.AMBER VIALS	$6/12-$50/144
SM.CLEAR VIALS	$6/12-$50/144
LG.AMBER VIALS	$9/12-$60/144
LG.CLEAR VIALS	$9/12-$60/144
$3 VIAL W/SPOON	$1.80
$12 4oz.DMSO SOLVENT	$7.20
$30 DEERING PREP	$18
$2.50 SNO SEALS	$1.50
$10 HARLEY NECKLACES	$6
$4 PINCH HITTER	$2.40

TECHNICIANS PRODUCTS
THE FINEST MADE

RETAIL	40%OFF
$50 ½oz.PROCAINE	$30
$100 1oz.PROCAINE	$60
$200 4oz.PROCAINE	$120
$300 8oz.PROCAINE	$180
$50 ½oz.BENZOCAINE	$30
$200 4oz.BENZOCAINE	$120
$300 8oz.BENZOCAINE	$180
$500 16oz.BENZOCAINE	$300
$100 ½oz.LIDOCAINE	$60
$300 4oz.LIDOCAINE	$180
$500 8oz.LIDOCAINE	$300
$800 16oz.LIDOCAINE	$480

MANNITE OR MANNITOL
SAME THING-BOTTLES

$10 ½oz.	$6
$20 1oz.	$12
$50 4oz.	$30
$75 8oz.	$45
$125 16oz.	$75

BARS-BLUE LADY

$6 8.5gr.	$3.60
$18 22.5gr.	$10.80
$3,125 -25LBS.BULK	$1,875
$15 ½oz.INOSITOL	$9
$30 1oz.INOSITOL	$18
$50 2oz.INOSITOL	$30
$75 4oz.INOSITOL	$45
$125 8oz.INOSITOL	$75
$200 16oz.INOSITOL	$120

$5 DRY ICE $3
$4 KEY CLIP I NONEREMOVABLE $2 $5 REMOVEABLE $3
$12 DUGOUT & P.HITTER $7 $13 INLAID DUGOUT $8

SUPERIOR PRODUCTS-
THE BEST-BOTTLES

RETAIL	40% OFF
$10 ½oz.SUPERIOR CUT	$6
$10 ½oz.SPARKEL CUT	$6
$10 ½oz.SUPERIOR MANNITOL	$6
$10 ½oz.SUPERIOR B INOSITOL	$6
$10 ½oz.B TRONS INOSITOL	$6
$10 ½oz.SUPERIOR INOSITOL	$6
$10 ½oz.SUPERIOR SUPER FINE SPARKEL	$6
$10 ½oz.DIAMOND CRYSTAL	$6
$30 2oz.SUPERIOR INOSITOL	$18
$30 2oz.SUPERIOR SUPER FINE SPARKEL	$18
$30 2oz.SUPERIOR MANNITOL	$18
$5 GOLD BLADE	$3
$5 GOLD CHOPPER SPOON	$3
$5 GOLD STRAW	$3
$15 SNO TOKER F.BASE KIT	$9
$25 SNO TOKER SUEDE F. BASE KIT	$12
$11 D HYDRO BOTTLE	$6.60
$18 DEERING GR.SCALE	$11
$18 D BULLET	$11

MINIMUM ORDER $25

ATTENTION PARAPHERNALIA MFGS.

FORBIDDEN FRUIT IS THE ONLY WAREHOUSE DISTRIBUTOR IN IOWA AND NEBRASKA AND WE HAVE JUST COMPLETED OUR FIRST YEAR IN BUSINESS. OUR GROSS SALES FOR THE YEAR WERE $267,000.

WHEN WE STARTED OUR BUSINESS, NORML GAVE US A COPY OF THEIR MAILING LIST. 33 STORES BETWEEN THE 2 STATES. WE DO WEEKLY MAILINGS TO THIS PROSPECT LIST AND FOLLOW UP BY PHONE. STARTING IN OCTOBER WE ARE PUTTING A ROAD SALESMAN ON TO DEVELOP THE GROCERY STORE CIG. PAPER BUSINESS AND TO HANDLE THE 33 STORES PLUS FIND NEW PROSPECTS.

MOST OF OUR MERCHANDISE HAS BEEN BOUGHT FROM MASTER DISTRIBUTORS AND WE HAVE 2 MAJOR PROBLEMS BY BUYING THIS WAY. DISCOUNT AND CATALOG SHEETS. THE COST TO MAKE A CATALOG FOR 33 PROSPECTS IS VERY COSTLY. THE MASTER DISTRIBUTOR CAN NEVER SUPPLY US WITH CATALOG SHEETS ON YOUR LINE.

WE NEED MFGS. WHO WILL SUPPLY US WITH 40 CATALOG SHEETS AND WORK WITH US ON 40% DISCOUNT OR BETTER ON SMALLER QUANTITIES WHILE WE ARE GROWING. OUR BUYERS START OFF WITH 2 OR 3's OF AN ITEM BUT WE HAVE BEEN ABLE TO DEVELOP CERTAIN ITEMS THAT WE NOW HAVE REORDERS ON OF 10 TO 20 DOZEN EVERY WEEK.

OUR FUTURE PLANS ARE TO BE A COMPLETE 1 STOP DISTRIBUTOR WITH SALESMEN IN ALL MIDWESTERN STATES. WE STOCK $30,000 IN OUR WAREHOUSE NOW AND HOPE TO BE MORE THAN DOUBLE THAT WITHIN 6 MONTHS.

OPEN TERMS WE ARE JUST NOW APPLYING FOR BUT OUR CREDIT AND ASSETS ARE EXCELLENT. COMPANY CHECKS ARE ACCEPTED BY LENTER, FINE LINE, OAT WILLIES, NALPAC. BESIDES THE DISTRIBUTING CO., WE OWN A DISCO, SMALL STEAK CO., PINBALL ARCADE, AND T-SHIRT SHOPS.

BANK REFERENCES ED STERN- NAT. BANK OF DES MOINES 515-225-8282
SAVINGS ACCT.# 570183

GARY JULSON- EAST DES MOINES NAT. 515-265-1431
SAVINGS ACCT.#122-212-4
CHECKING # 13-715-8

NEW ACCOUNT AT FIRST FEDERAL STATE BANK 515-277-6442
CHECKING #01-796-2

IF YOU CANNOT USE US AS A DISTRIBUTOR, STILL PLEASE SEND US 40 CATALOG SHEETS AND WE WILL KEEP BUYING YOUR LINE FROM A MASTER DISTRIBUTOR.

Buy some of your line from other distributors. Think we could do a great job for you, if you need a client in these 2 states.

THANK YOU,
LANA C. ACTY (PRES.)
GEORGE MOORE (SALES MGR, BUYER
FORBIDDEN FRUIT
1510 E. DOUGLAS
DES MOINES, IOWA 50313
515-265-5501
CAN LEAVE MESSAGE- 515-266-9286

GOVERNMENT EXHIBIT 91 Cr. 80-33

PSEUDO CAINE

The Hottest Active Cut In The Nation!

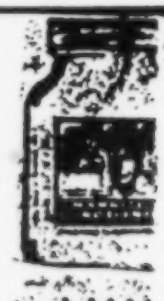
	Retail:	Wholesale:
1/2 grams	$ 11.99	$ 6.00
5 grams	$ 29.99	$15.00
1 oz.	$159.95	$80.00

Now You Can Buy LEGAL STIMULANTS By Mail!

- SAFE • NO HASSLE
- NO WORRY • NO PROBLEMS

LEGAL STIMULANTS Pick you up like Many Prescription Drugs.

100% LEGAL



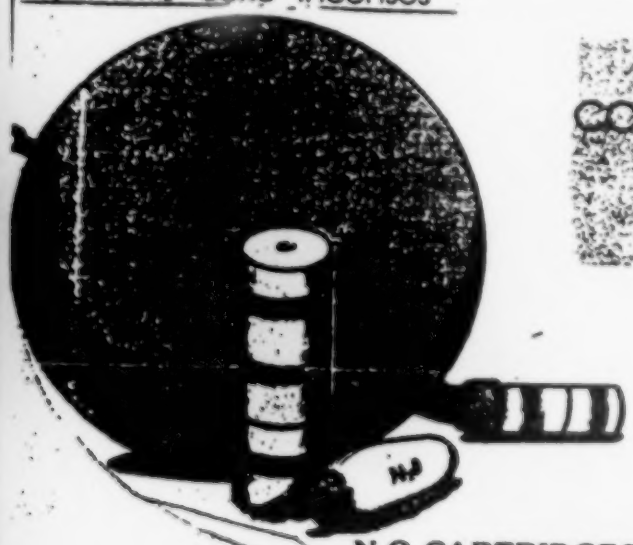
$10 #4-$3

$20 #5 MANNIT
$20 #6 MANNIT
$20 #7 CRYSTA
20 BOTTLES FO

What Is Pseudo Caine?

It's the new cut product everybody who bought Mannitol is now begging for! Pseudo Caine passes all "tests" with flying colors. "Burns" just like the real thing. By far superior to other "synthetic coke incenses"

#12 $250 BOTTLE OF 1,000/$50
XMAS TREES, BLACKS, ROBIN EGGS, YELLOWS, WHITE CROSSES ETC.



N,O CARTRIDGES

$6 #13 85¢
100 FOR $75

#14 $1.10
100 FOR $100

#18 $20-$3
100 FOR $275

40 FOR $

$10 #8 INFLATOR $3
$15 #9 ADJ. INFLATOR $4
$10 CASE OF NITROUS $95
$1 BALLON #11 $3.60/12

#17 WHITE LADY MANNITE
$15.00
Weight 1 lb.

#16
Weight 1/2 lb.

BLUE SNO SEALS

#20 $2.50/95¢
100 FOR $85

CHEMIST OR SNOW TOKER
#21 $10 ETHER SOLVENT $3
#22 $3.50 SOLUTION $1.40
#23 $3.50 AMMONIA SOLUTION $ .40

#24 $15 CHEMIST FREE BASE KIT $6
#25 $14 SNOW TOKER FREE BASE KIT $ .60

GOVERNMENT EXHIBIT 164 Ps. 90-33

FORBIDDEN FRUIT
PO BOX 3170
DES MOINES, IA.
515-266-9286
800-247-7450

PSEUDO CAINE

The Hottest Active Cut In The Nation!

	Retail:	Wholesale:
1/2 grams	$ 11.99	$ 6.00
5 grams	$ 29.99	$15.00
1 oz.	$159.95	$80.00

Now You Can Buy

LEGAL STIMULANTS By Mail!

- SAFE • NO HASSLE
- NO WORRY • NO PROBLEMS

LEGAL STIMULANTS Pick you up like Many Prescription Drugs.

100% LEGAL

SUPERIOR CUT
weight 14.17 grams

$10 #4-$3

MANNI
CONOSCEN
BOTTL
weight
28.
gran

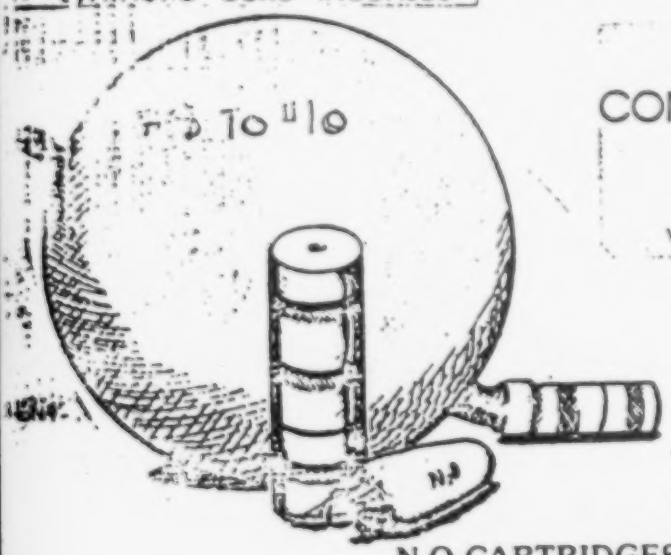
$20 #5 MANNITE
$20 #6 MANNITOL
$20 #7 CRYSTAL

20 BOTTLES FOR

What is Pseudo Caine?

It's the new cut product everybody who bought Mannitol is now begging for! Pseudo Caine passes all "tests" with flying colors. "Burns" just like the real thing. By far superior to other "synthetic coke incenses"

#12 $250 BOTTLE OF 1,000/$50
XMAS TREES, BLACKS, ROBIN EGGS, YELLOWS, WHITE CROSSES ETC.



N,O CARTRIDGES

MANNITE CONOSCENTI BLUE LADY
weight 8.5 grams

$6 #13 .85¢
100 FOR $75

#14 $1.10
100 FOR $100

#18 $20-$3
100 FOR $275

$2.75 #
40 FOR $1

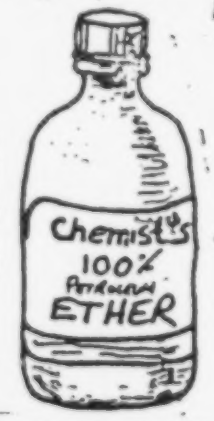
BABY HAWAIIAN WOODROSE SEEDS

Fertile, the peyote of Asia
20 per package
Retail $3 package
$18/doz. ($1.50 pk.)
$60/4 doz. ($1.25 pk.)

#19

BLUE SNO SEALS

#20 $2.50/95¢
100 FOR $85



LA
BL
MAN
CONOSC
weight 22.5

CHEMIST OR SNOW TOKER
#21 $10 ETHER SOLVENT $3
#22 $3.50 SOLUTION $1.40
#23 $3.50 AMMONIA SOLUTION $1

#24 $15 CHEMIST FREE BASE KIT $6
#25 $14 SNOW TOKER FREE BASE KIT $5

$10 #8 INFLATOR $3
$15 #9 ADJ. INFLATOR $4
#10 CASE OF NITROUS $95
$1 BALLON #11 $3.60/12

WHITE LADY MANNITE
$8.00 #16
Weight 1/2 lb.

#17 WHITE LADY MANNITE
$15.00
Weight 1 lb.

FORBIDDEN FRUIT
PO BOX 3170
DES MOINES, IA. 50
515-266-9286
800-247-7450

SUPERIOR MANNITOL
1.½oz.$3-24+$2.50
2.2oz.$9-12+$8.50

SUPERIOR CUT
3.½oz.$3-24+$2.50

SUPERIOR B
4.½oz,$3-24+$2.50

SUPERIOR INOSITOL
5.½oz.$3-24+$2.50
6.2oz.$9-12+$8.50

SUPERFINE SPARKEL
7.½oz.$3-24+$2.50
8.2oz.$9-12+$8.50

SUPERIOR MANNITOL
1.½oz.$3-12 TO 23 $2.75
24 TO 71 $2.50-72+$2.25
2.2oz.$9-6 TO 11 $8.75
12 TO 23 $8.50-24+$8

SUPERIOR MANNITOL
1.½oz.1 TO 11 $3-12 TO 23 $2.75
24 TO 71 $2.50-72 + $2.25
2.2oz.1 TO 5 $9-6 TO 11 $8.75
12 TO 23 $8.50-24 + $8

SUPERIOR CUT
3.½oz.1 TO 11 $3-12 TO 23 $2.75
24 TO 71 $2.50-72 + $2.25

[redacted]

DISTRI OF 12
$2

TERMS-ALL ORDERS-UPS COD CASH OR CERT.
CALL TOLL FREE 10-8 MON.-SAT.
SUNDAY-1 TO 5
ALL PRICES ARE LISTED FOR CASE QUQNTITIES.ADD

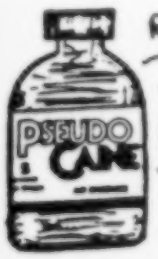
PRICES ON THIS FLYER ARE LISTED FOR CASE

PRICES

FORBIDDEN FRUITS 5th YEAR ANNIVERSARY GET ACQUAINTED SALE

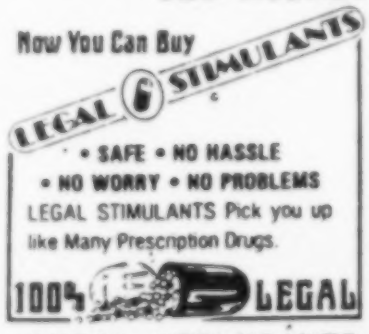
MOST ITEMS UNDER OUR COST-YOU CAN ORDER ONCE FROM THIS FLYER AT THESE PRICES. STATE THAT YOU ARE ORDERING FROM FLYER #53 TO GET THESE PRICES & REQUEST FLYER #52 FOR ALL FUTURE ORDERS. #52 IS OUR REG. ANNIVERSARY SALE FLYER SHOWING 100's OF MORE ITEMS ON SALE TO JAN. 1st WITH DISCOUNTS OF 20% TO 90%. ALL ORDERS OFF THIS FLYER COD CASH OR CERT. CHECK. FOR CO. CHECK WRITE FOR CREDIT APPLICATION.

800-247-7450 FORBIDDEN FRUIT SOLD TO
515-266-9286 IA. DES MOINES, IA. 50313 ADDRESS -



REG $6
$4.75
REG $15
$11.50

PSEUDO CAINE INCENSE. HOTTEST SELLING ITEM IN U.S. MADE FROM THE QAT PLANT. SIMILAR TO THE COCO PLANT.
1. $30 1.5gr. BOTTLE $4.75
2. $100 5gr. BOTTLE $11.50



#20
1,000
P.115
For
$50

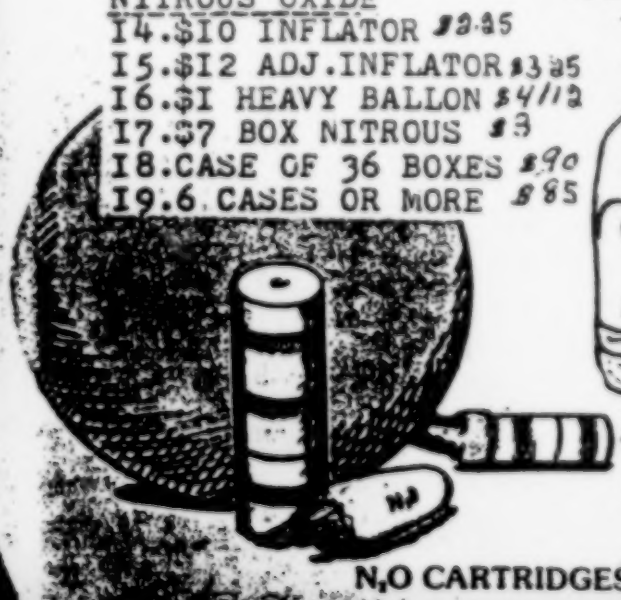
LEGAL STIMULANTS. THEY LOOK & ACT LIKE BLACKS, YELLOWS, CROSSES ETC. PACKED 1,000 TO A BOTTLE
$200 to $600 RETAIL
#20 - $50 a BOTTLE

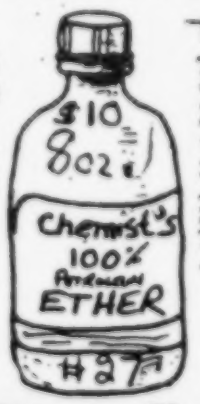
$60/100 #3
6.5¢ EACH
$990/500

MANNITE
BLUE LADY WHITE STUFF
3. $6 8.5gr. BAR $60/100 6.5¢ EACH
4. $18 22.5 BAR $2.25
5. $20 1oz. BOTTLE $4
CRYSTAL
6. $25 1oz. BOTTLE $4.10
7. $300 1 lb. BOTTLE $14
MANNITOL
8. $10 ½oz. SUPERIOR CUT $2.99
9. $20 1oz. BOTTLE $4
10. $200 1 lb. BOTTLE $12
VITAMIN B INOSITOL FOWDER
11. $15 ½oz. BOTTLE $3
12. $125 4oz. BOTTLE $9
13. $400 1 lb. BOTTLE $25

BUTYL NITRITE
22. $10 LOCKER ROOM $1
PROCAINE & BENZOCAINE
23. $5 PROCRYSTAL 1gr. $1
24. $20 COCO LEAF 3gr. $3
25. $100 PURE PROCAINE $4 ½oz.
26. $100 PURE BENZOCAINE $4 ½oz.
#23 & 24 ARE MADE OUT OF PROCAINE OR BENZOCAINE & MANNITE.
#23 IS LIKE ROCK CRYSTAL

NITROUS OXIDE
14. $10 INFLATOR $2.85
15. $12 ADJ. INFLATOR $3.85
16. $1 HEAVY BALLON $4/12
17. $7 BOX NITROUS $3
18. CASE OF 36 BOXES $90
19. 6 CASES OR MORE $85





#27 - $2
#27A - $20/doz.

THE FOLLOWING ARE SNO TOKER ITEMS
28. $10 8oz. SOLVENT 2 $3 - $33/12
29. $5 2oz. SOLVENT 2 $1.85 - $21/12
30. $3.50 2oz. BASE SOLUTION $1.10 $13/12
31. $3.50 2oz. AMONIA SOLUTION $1.10 $13/12
~~32. $15 CHEMIST FREE BASE KIT~~
33. $14 SNOW TOKER FREE BASE KIT $4.50

FREE BASE TORCH
34. $20 TORCH $7
35. $2.50 CYLINDERS $2/3

SNOW ITEMS
36. $6 PLASTIC BULLET SNORTER $12/12
37. $5 MINI COKE KIT $1.60
38. $8 SUEDE COKE KIT GOLD PARTS $2.50
39. $12 lg. SUEDE COKE KIT GOLD PARTS $4
40. $16 lg. LEATHER COKE KIT AGATE $6

MORE SNOW ITEMS
41. $5 LINE UP COKE KIT $1.85
42. $2.50 SNO SEALS $10/12
43. $3 COKE SPOONS $9/doz. GREAT BUY
44. $2 HEAVY GOLD BLADE $6/doz. GREAT BUY
45. $6 SCREEN Z $18/6 GREAT BUY
46. $11 D HYDRO BOTTLE $3.75 GREAT BUY
47. $17.50 D BULLET $6.25
48. $1 GLASS SNORTER $3/doz.
49. $6 DRY ICE $2 GREAT BUY
50. $2 SCREW ON FUNNEL CAP $6.50/doz. GREAT BUY
51. $4 GLASS CLEAN & SWEEP $12.50/doz. GREAT BUY
52. $3 SNORKEL SNORTER $10/doz. GREAT BUY
53. 75¢ SNO SPOONS $5/25 GREAT BUY
54. $30 DEERING PREP $18.50
55. $8 GLASS FREE BASE PIPE $3
56. $12 GLASS F.B. PIPE $4.50
57. $3 GOLD KNIFE SPOON $4.50/doz. GREAT BU
58. $3 GOLD SNORTER $4.50/doz. GREAT BU

OAT WILLIES HARLEY MIRRORS
59. $22 MIRRORS $6.95 Asst.

#60 $3.50
$11/A Doz.

#59 - $22 - $6.9

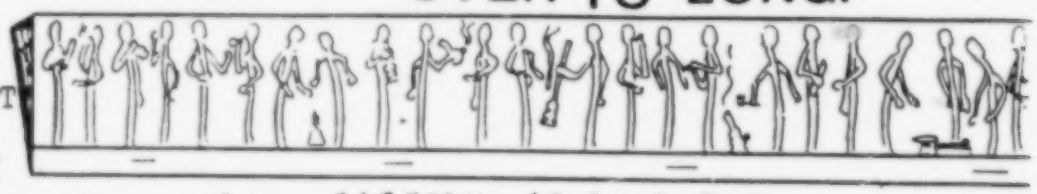
OAT WILLIES ENAMEL CLIPS
60. $3.50 HARLEY BAT WING $1.50
61. ALL OTHER STYLES $15/Doz.

KILLER DEALS

#37 - $5
MINI COK
KIT. $1.

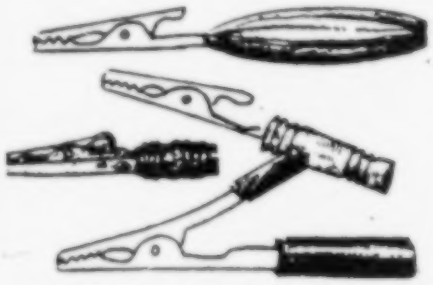
HIDDEN CLIPS
62.$5 UP YOUR ASS FINGER $2
63.$5 GRENADE $2
64.$5 DICK $2
65.ALL OTHER $5 HIDDEN CLIPS & CAST CLIPS.gun,motercycle,car,lovers, lg.helping hand,screw,spark plug etc.XXXX $9 A DOZ. ASST.

MATCHES **OVER 15" LONG!**



#300 - 3/RETAIL $3.60 A DOZ.

#133 - $1/40 150 MATCHES - $8



#71 - 75¢ 4 STYLES ASST. BASIC CLIPS - USE AS XMAS PRESENTS FOR CUSTOMERS OR SELL. $3.40 A DOZ
#71A $12/6 DOZ.
#71B $21/144

#75A BOTTLE OPENER CLIP $7.50 A DOZ.

#67 $.5 KEY $9/DOZ.

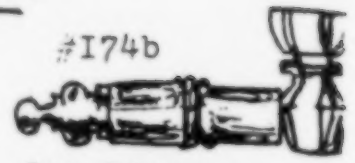
#6983 EXTENDO CLIP → 99¢

#705 EXTENDO CLIP - $1.75

#74 - $2 ASST. STYLE BASIC CLIPS 100's OF STYLES - $8 A DOZ.

#I74a REG $18/DOZ NOW $10/DOZ

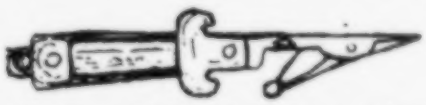
#I74AA - ABOVE WITH CAP BOWL $12/DOZ.



#I74b
REG. $15 A DOZ.
NOW $8.10 A DOZ.
#174BB WITH CAP BOWL $10/D

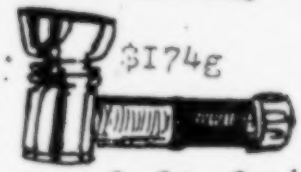
#I74c
#174C - REG. $13/DOZ. NOW $7.50 DOZ.
#174CC WITH CAP BOWL $9/DOZ.

#174E - REG. $18 A DOZ. NOW $9 A DOZ.
#174EE - WITH CAP BOWL - $11/DOZ



#68 - $5 SWITCH BLADE $9/6 $17/DOZ.

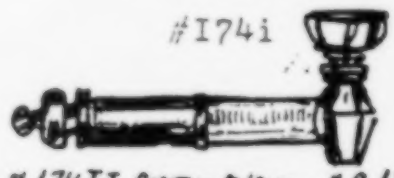
#66 - $6 HEMOSTATS $1.90



#I74G
#1746 - REG. $12/DOZ. NOW $7.50/DOZ
#17466 W/METAL MOUTH PIECE $9/DOZ.
#174666 - ABOVE WITH CAP BOWL $11 DOZ

#I74h
REG. $12/DOZ.
NOW $7 DOZ.
#174HH WITH BOWL CAP $9/DOZ

#75B $3.50 LEATHER STEM $1.25
#194 $8 LG. CLUB TRAYS - $1.75
#169 SHEESHAM/BRASS PIPES TO $6 - $9/DOZ.
#212 1/2 CHICKEN FOOT PIPES - $3.25



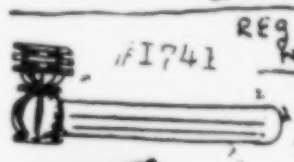
#I74i
#174II PLASTIC M/PIECE $8/DOZ.
#174I REG. $16 NOW $11/DOZ.
#174III $12 DOZ. WITH CAP BOWL

#I74j
REG. $12 NOW $7 DOZ.
#174JJ $9 A DOZ. WITH CAP BOWL

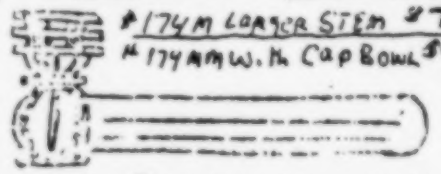
#I74k
REG $10 80 DOZ. NOW $7 DOZ.
#174KK WITH CAP BOWL $9 DOZ.

I96a.$3.50 sm.ROUND BOX.FANCY INLAY DESIGN.75¢
I96b.$4 sm.TALL ROUND BOX WITH SMALLER BOX INSIDE.$1
I96c.$4 ASST.SHAPES PLAIN WOOD BOX,DIAMOND,OVAL,HEART ETC.$6/6
I96d.$5 SAME AS ABOVE BUT HAS M.LEAF INLAY.$9/6
I96e.$5 med.BRASS INLAY SQUARE BOX.$9/6
I96f.$6 FLIP TOP MED.BRASS INLAY BOX.$2
I96g.$8 FLIP TOP LG.BRASS INLAY BOX.$2.25

#I74n



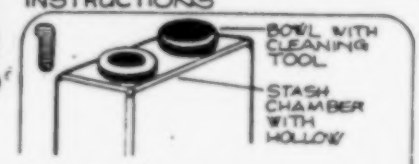
#I74l
REG $11 DOZ. NOW $6 DOZ.
#174LL W. M Cap Bowl $9 DOZ.

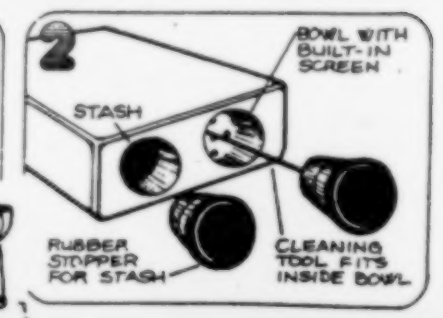


#174M LONGER STEM $7 DOZ.
#174MM W. M Cap Bowl $9 DOZ.

#181 - 34 HANDY HI - $9 DISPLAY OF 12

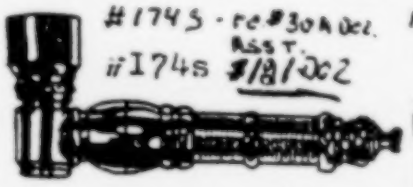
HANDY-HI POCKET PIPES*



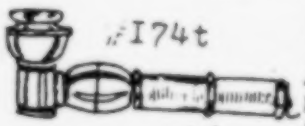


BOXES BOXES BOXES

#174S - RE $30 A DOZ. ASST. #I74s $18/DOZ



#174t - RE $36 A DOZ. ASST. $15 A DOZ.



#I74t

#174N $9 DOZ.
#174NN WITH CAP BOWL $11 DOZ.

#1740 S.M. CHAMBER, TO $36 A DOZ. ASST. $18 A DOZ.

ALL MERCHANDISE LIMITED QUANTITIES

WHOLESALE-SALE PRICE
PSEUDO CAINE
1.$6 1½gr.$5.40-12 OR MORE $4.50
2.$15 5gr.$13.50-12 OR MORE

WHOLESALE-OUR PRICE
PSEUDO CAINE-25% OFF
1.$6 1½gr.$5.40-12+$4.50
2.$15 5gr.$13.50-12+$11.25
3.$80 1oz.$72-6+$60

WHOLESALE-OUR PRICE
SUPERIOR CAINE-50% OFF
4.$6 2gr.$3.60-12+$3
5.$15 5gr.$9-12+$7.50
6.$80 1oz.$48-6+$40

WHOLESALE-OUR PRICE
SUPERIOR CUT-55% OFF
7.$5 ½oz.$3-24+$2.25
8.$15 2oz.$9-12+$6.75

WHOLESALE-OUR PRICE
SPARKEL CUT-55% OFF
9.$5 ½oz.$3-24+$2.25

WHOLESALE-OUR PRICE
SUPERIOR INOSITOL-55% OFF
10.$5 ½oz.$3-24+$2.25
11.$15 2oz.$9-12+$6.75

WHOLESALE-OUR PRICE
SUPERIOR B-55% OFF
12.$5 ½oz.$3-24+$2.25

WHOLESALE-OUR PRICE
SUPERFINE SPARKLE-55% OFF
13.$5 ½oz.$3-24+$2.25
14.$15 2oz.$9-12+$6.75

WHOLESALE-OUR PRICE
DIAMOND CRYSTAL-55% OFF
15.$5 ½oz.$3-36 + $2.25

WHOLESALE-OUR PRICE
DIAMOND CRYSTAL-55% OFF
15.$5 ½oz.$3-24+$2.25

WHOLESALE-OUR PRICE
DIAMOND SCORE-5)

WHOLESALE-OUR PRICE
DIAMOND SCORE-50% OFF
16.$6 2gr.$4-24+$3.

WHOLESALE-OUR PRICE
ULTRACAINE-40% OFF
17.$5 1gr.$4-24+$3

WHOLESALE-OUR PRICE
SUPERCAINE-40% OFF
18.$5 1gr.$4-24+$3

WHOLESALE-OUR PRICE
COCO LEAF-50% OFF
19.$5 3gr.$3.50-12+$2.50

WHOLESALE-OUR PRICE
TECH PROCAINE-

BEST AVAILABLE COPY

AFTER XMAS SALE-LOWEST PRICES IN THE U.S.USE SALE ENDS DEC.10th YELLOW FLYER
FORBIDDEN FRUIT-800-247-7450-IA.515-266-9286-MINIMUM ORDER $100-SALE ENDS FEB.1st

PSEUDO CAINE-30% OFF
1.1½gr.$4.20
2.5gr.$10.50
3.1oz.$56

SUPERIOR CAINE-40% OFF
4.2gr.$3.60
5.5gr.$8.99
6.1oz.$48

SUPERIOR PRODUCTS-55% OFF
7.½oz.$2.25 MANNITOL
8.½oz.$2.25 SUP.CUT
9.½oz.$2.25 SPARKEL CUT
10.½oz.$2.25 SUP.B
11.½oz.$2.25 SUP.INOSITOL
12.½oz.$2.25 SUPERFINE
13.½oz.$2.25 BLUE LADY

SUPERIOR PRODUCTS 2 oz.-50% OFF
14.2 oz.SUP.SUPERFINE $8
15.2 oz.SUP.INOSITOL $8
16.2 oz.SUP.MANNITOL $8

BLUE LADY BARS
17.8.5gr.$1
18.22.5gr.$2.50
19.25 lbs.BULK $250

TECHNICIANS PRODUCTS
PROCAINE
20.½oz.$3.50
21.1oz.$6
22.4oz.$10.50
23.8 oz.$20

BENZOCAINE
24.½oz.$3
25.4oz.$9
26.8oz.$18
27.16oz.$33

MANNITOL
28.1oz.$1.80
29.4oz.$4.50
30.8oz.$8.25
31.16oz.$15

LIDOCAINE
32.½oz.$7.50
33.4oz.$27
34.8oz.$45
35.16oz.$75

MISC.
36.PROCRYSTAL 99¢
37.PROCRYSTAL @ $2
38.ROCK CRYSTAL 99¢

INOSITOL
39.½oz.$3
40.1oz.$7
41.2oz.$9
42.4oz.$10.50
43.8oz.$20
44.16oz.$38

NITROUS OXIDE
45.BOX CHARGERS $3.75
46.CASE """""""".$100
47.BALLON 35¢
48.INFLATOR $2
49.INFLATOR $2

TOOT PRODUCTS
~~50~~.SUPERTOOT $4.50 #52
~~51~~.TOOT $5 #53
~~52~~.ZOOM $5 #54
~~53~~.RELAX-U $5 #55

DIAMOND PRODUCTS 50% OFF
50.SCORE $3
51.DIAMOND CRYSTAL $2.50

MISC.INCENSE-UP TO 50% OFF
56.SUPERCAINE $3.25
57.ULTRACAINE $3.25
58.COCO LEAF $2.50
59.2gr.MILKY TRAILS $3
60.4gr.MILKY TRAILS $6
61.½oz.MILKY TRAILS $20

HARLEY BONGS
62.SKULL $8.60
63.BAT WING $7.40

HARLEY NECKLACES
64.$2 ASST.
65.$7/12 ASST.

50

AFTER XMAS SALE-LOWEST PRICES IN THE U.S

FORBIDDEN FRUIT-USE YELLOW FLYER & THE FOLLOWING PRICES.SALE ENDS FEB.I0th 82

PSEUDO CAINE-30% OFF
I.I½gr.$4.20
2.5gr.$I0.50
3.Ioz.$56

SUPERIOR CAINE-50% OFF
4.2gr.$3
5.5gr.$7.50
6.Ioz.$40

SUPERIOR PRODUCTS-55% OFF
7.½oz.SUPERIOR MANNITOL $2.25
8.½oz.SUPERIOR CUT $2.50
9.½oz.SPARKEL CUT $2.50
I0.½oz.SUPERIOR B $2.25
II.½oz.SUPERIOR INOSITOL $2.50
I2.½oz.SUPERFINE SPARKEL $2.25
I3.½oz.BLUE LADY MANNITE $2.25
I4.2oz.SUPERFINE SPARKEL $7.50
I5.2oz.SUPERIOR INOSITOL $7.50
I6.2oz.SUPERIOR MANNITOL $7.50
BLUE LADY MANNITE BARS
I7.8.5gr.$I.25-$I00/I00
I8.22.5gr.$2.75-$I00/40
I9.25 lbs BULK B.LADY MANNITE
IN BAG IN BOX.$250.00

TECHNICIANS ITEMS-UP TO 80% OFF
20.½oz.PROCAINE $3.75
2I.Ioz.PROCAINE $6
22.4oz.PROCAINE $I0.25
23.8oz.PROCAINE $20

24.½oz.BENZOCAINE $3
25.4oz.BENZOCAINE $9
26.8oz.BENZOCAINE $I8
27.I6oz.BENZOCAINE $33
28.
28.Ioz.MANNITOL $I.79**********
29.4oz.MANNITOL $4.50
30.8oz.MANNITOL $8.25
3I.I6oz.MANNITOL $I2

32.½oz.LIDOCAINE $7.50
33.4oz.LIDOCAINE $27
34.8oz.LIDOCAINE $45
35.I6oz.LIDOCAINE $75

36.PROCRYSTAL I $I.25
37.PROCRYSTAL 2 $2.50
38.ROCK CRYSTAL $I.25

39.½oz.INOSITOL $2.50**********
40.Ioz.INOSITOL $6.75
4I.2oz.INOSITOL $8.25
42.4oz.INOSITOL $I0.50
43.8oz.INOSITOL $I8

NITROUS OXIDE-PRICE INCREASE
45.BOX OF I0 CHARGERS $4
46.CASE OF 36 BOXES $I08
47.HEAVY BALLON 40¢-$35/I00
48.METAL INFLATOR $2.50
49.PLASTIC ADJUSTABLE INFLATOR $2.50

DIAMOND PRODUCTS-55% OFF
50.SCORE 2gr.BETTER THEN PSEUDOCAINE $3
5I.½oz.DIAMOND CRYSTAL $2.25

TOOT PRODUCTS-UP TO 20% OFF
52.SUPER TOOT $4
53.TOOT $5
54.ZOOM $5
55.RELAX-U $5

MISC.WHITE POWDER INCENSE
56.SUPERCAINE $3.25
57.ULTRACAINE $3.25
58.COCO LEAF $2.75
59.2gr.MILKY TRAILS $3
60.4gr.MILKY TRAILS $6
6I.½oz.MILKY TRAILS $2I

SARAHS FAMILY BONGS
62.HARLEY SKULL $9.90
63.HARLEY DAVIDSON BAT WING $8.I0

HEAVY HARLEY NECKLACES
64.$2 EACH-I2 ASST.DESIGNS

ASST.PIPES INCLUDING NOW-SOAPSTONES ECT.
VALUES TO $5
65.99¢ EACH

MISC.ITEMS
65a.GOLD BLADE $6/I2
66.GOLD CHOPPER SPOON $6/I2
67.GOLD STRAW $6/I2
68.PINCH HITTER $I6/I2
69.DUGOUT $4.80
70.INLAID DUGOUT $5.20
7I.REG.& FREE BASE SCREENS-ASK FOR SIZES
& PRICES

SNO TOKER ITEMS
72.FREE BASE KIT $5.50
73.SUEDE F.BASE KIT W/HAND PIPE $9
74.8oz.SILVER LABEL $3.50-$36/I2
75.8oz.GOLD LABEL $4.50-$48/I2
76.2oz.BASE $I.75-$30/24
77.2oz.AMMONIA $I.75-$30/24
78.EYE DROPPERS $3/I2
79.FREE BASE VIALS $9/I2
80.½oz.B TRONS BRAND INOSITOL $2.25

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Criminal No. 90-33
	:	(Filed Feb. 4, 1991)
vs.	:	
POSTERS 'N THINGS LTD., an Iowa Corporation, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY; GEORGE MICHAEL MOORE, a/k/a MIKE MOORE, d/b/a/ G. MICHAEL MOORE ENTERPRISES; AND LANA CHRISTINE ACTY, a/k/a CHRIS ACTY,	:	
Defendants.	:	

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT

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DIVISION I
RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT

1. That the Defendants were convicted following jury trial on Counts 1 through 9 on the 28th day of December, 1990.

2. That both at the close of the Government's case in chief and at the close of all the evidence, Defendants moved for judgment of acquittal as to Counts 1 through 9 and asserted on the record the grounds therefore.

3. The Court granted through and including February 4, 1991 for Defendants to renew their Motion and to file a Motion for New Trial.

4. That the Defendants hereby reassert their Motion for Judgment of Acquittal in its entirety, as previously raised, and further incorporate by reference as though fully set out herein the grounds, arguments and record previously urged in support of said Motion.

WHEREFORE, the Defendants pray that the Court grant their Motion for Judgment of Acquittal as to each and every Count alleged in the Indictment or for such specific relief as the Court may grant as to any particular Count.

DIVISION II
MOTION FOR NEW TRIAL

COME NOW the Defendants and for their Motion for New Trial, pursuant to Rule 33, state as follows:

1. That Defendants hereby incorporate as though fully set out herein Paragraphs 1 through 3 of Division I of this combined motion.

2. That the Court should, in the interest of justice, grant Defendants a new trial as to each and every count, on the following grounds:

A. That the Trial Court excused on December 7, 1990, from further jury service, the entirety of the selected petit jury in the case entitled *U.S. v. Goddard,* Criminal No. 90-101. The Court excused said jury from further service in violation of 28 U.S.C. Section 1866(c). By Order entered December 14, 1990, the Court ordered the Clerk to return the jurors names to the list. None of the illegally excused jurors were part of the array available for jury selection by these Defendants on December 10, 1990. The actions, as aforesaid, were in violation of the Defendants' right to receive a fair trial under the United States Constitution; denied to each Defendant its right to a fair and impartial jury, and was in violation of the Defendants' rights to fundamental fairness. In support thereof, see

Exhibit "A" attached hereto and by this reference made a part hereof.

B. The Court erred in applying an "objective" rather than "subjective" standard to items listed in Section 21 U.S.C. 857(d) as evidenced by jury Instructions No. 37 and No. 39.

C. The Court erred in receiving in evidence, over proper and timely objection by Defendants, exhibits recovered from Defendants' home, business or other sites such as flyers, magazines, catalogues, etc. that clearly were irrelevant and remote in time to any issue in this cause. These items were received solely on the "relevancy" basis of the Defendants' "knowledge" as to items of supposed drug paraphernalia in spite of the fact that the Court instructed (Instruction No. 39) that the knowledge of the accused is irrelevant.

D. The Court erred in receiving in evidence over proper and timely objection by the Defendants, Exhibit 100B in that the same had no proper foundation, was irrelevant and in violation of F.R.E. 403.

E. The Court erred in giving Instruction No. 18 concerning the testimony of the witness Judd Golden and the Court's consequent failure to give Defendants' proposed instruction dealing with said testimony, all serving to deny Defendants a defense to which they were entitled to have weighed by the jury.

F. The Court erred in giving Instruction No. 36, dealing with Count 9 for the reason that said Instruction does not require the Government to prove, as essential elements of the offense, all of the specified unlawful

activity alleged in Count 9 of the Indictment, to wit, 21 U.S.C. Section 857, 21 U.S.C. Section 841 (a)(1), 18 U.S.C. Section 2.

G. The Court erred in submitting Counts 4, 5 and 9, in particular, for consideration by the jury. The Government had not established a prima facie case with respect to those Counts and their submission by the Court colored the jury's deliberation and determination as to all the Counts of the Indictment.

H. The Court erred in receiving, over proper and timely objection, the "expert" testimony of Government witness Semesky. Said witness was permitted to testify without being properly qualified; further, the opinions offered by said witness were impermissible legal conclusions, were not of an aid to the trier of fact and in all respects violative of F.R.E. 702 and 704.

I. That the Government's witnesses who applied U.S.C. Section 857 under search and seizure warrants consistently identified Government's Exhibit 92A as the applicable law of the case. Government's Exhibit 92A was the original Federal Mail Order Drug Paraphernalia Control Act as passed in October, 1986 with an effective date of January 28, 1987. The original Act was amended by Congress on November 18, 1988 and clearly not the law allegedly violated under Counts 1 and 2 and under the overt acts as included in Count 3(a) and (b). This misapplication of 21 U.S.C. Section 857 clearly illustrated an unlawful search and seizure during each application of the law on which the Indictments against the Defendants was based.

WHEREFORE, Defendants pray the Court grant their Motion for New Trial for all the reasons stated hereinabove.

BRIEF POINT I

The Court erred by excusing from further jury service the entirety of the selected petit jury (which may or may not have included alternate jurors) on December 7, 1990 in the case entitled *U.S. v. Goddard,* Criminal No. 90-101. The Court admitted in its Order dated December 14, 1990 its lack of authority under 28 U.S.C. Section 1866(c) to excuse the jurors (Order attached to Defendants' Motion for New Trial and incorporated by reference). While unknown to the Defendants, the Court's action created a seven day window during which time the excused jurors were removed from the jury panel and thereby eliminated their possible participation in the jury list as provided to Defendants on December 10, 1990. The Court's action was in violation of Defendants' right to receive a fair trial under the United States Constitution; denied each Defendant its right to a fair and impartial jury as provided by the Sixth Amendment and was in violation of the requirement for fundamental fairness under the Fourteenth Amendment.

As declared in 28 U.S.C. Section 1861, "It is the policy of the United States that all citizens in Federal Courts entitled to a trial by jury shall have the right to grand and *petit* juries selected at random from a fair cross section of the community" (emphasis added). Further, a Defendant is entitled to require that those charged with jury selection, including judges who excuse jurors, proceed in a

way as to compel calling of all eligible for jury duty. *U.S. v. Burkett,* 342 F.Supp. 1264. Due to the Court's removal of at least twelve individuals from the jury panel who were unable to arrive at a verdict, the process to compose a "reasonably representative" petit jury from the community was violated. The Court's action was a complete departure from the congressionally adopted scheme for jury selection. This panel of "hung jurors" comprised a distinct and cognizant group that was specifically excluded from the jury selection panel. This exclusion impaired the random nature or objectivity of the jury selection process. *U.S. v. Haley,* 521 F.Supp. 290 (11th Cir. 1981). The Defendants further state that the aforestated constitutional challenges can be asserted even if the Court finds that the particular jury drawn from the questioned pool was unobjectionable. *U.S. v. Jenison,* 485 F.Supp. 655 (11th Cir. 1979). For the reasons so stated, the Defendants would pray the Court grant each Defendants' Motion for a New Trial.

BRIEF POINT II

This Court was in error in applying an "objective" standard to items listed in 21 U.S.C. Section 857(*d*) as evidenced by jury instruction no. 37.

The Mail Order Drug Paraphernalia Control Act found at 21 U.S.C. Section 857 is based on the Drug Enforcement Agency's Model Act drafted by the Drug Enforcement Administration of the United States Department of Justice, August 1979.[1] The definitional difference

[1] The text of the Model Act, originally drafted as an amendment to the Federal Uniform Controlled Substances Act, is set

between the Model Act and 21 U.S.C. Section 857(d) is the later's modification of "intended for use" by the term "primarily" and the deletion of "used". The definition of drug paraphernalia found in the Model Act has been reviewed under facial constitutional attacks by ten different federal circuits[2] with some circuits having multiple challenges. The U.S. Supreme Court has not reviewed a Model Act case.[3] Each reviewing Federal Circuit Court has agreed that the definitions of drug paraphernalia are subjective in nature. The Courts have argued that "designed for use" refers to the intent of the designer or manufacturer while "intended for use" refers to the

forth in Annot., "Validity, Under Federal Constitution, of So-Called "Head Shop" Ordinances or Statutes, Prohibiting Manufacture and Sale of Drug Use Related Paraphernalia", 69 A.L.R. Fed 15 (1984 and Supp. 1989), and as an Appendix to this opinion.

[2] *Rose v. Nashua Board of Education,* 679 F.2d 229 (1st Cir. 1988), *Brache v. Weschester County,* 658 F.2d 47 (2nd Cir. 1981); *Mid Atlantic Accessories Trade Ass'n. v. State of Maryland,* 500 F.Supp. 834 (D.Md. 1980); *Tobacco Accessories and Novelty Craftsman Merchants Ass'n v. Treen,* 681 F.2d 378 (5th Cir. 1982); *Record Revolution #6, Inc. v. City of Parma, Ohio,* 709 F.2d 534 (6th Cir. 1983); *Camille Corp. v. Phares,* 705 F.2d 223 (7th Cir. 1983); *Casbah, Inc. v. Thone,* 651 F.2d 551 (8th Cir. 1981), cert denied, 455 U.S. 1005, 102 S.Ct. 1642, 71 L.Ed.2d 874 (1982); *Stoianoff v. Montana,* 695 F.2d 1214 (9th Cir. 1982); *Weiler v. Carpenter,* 695 F.2d 1348 (10th Cir. 1982), *Florida Businessmen for Free Enterprise v. City of Hollywood,* 673 F.2d 1213 (11th Cir. 1982).

[3] The Supreme Court denied certiorari in three Model Act cases, *Casbah, Inc. v. Thone,* 651 F.2d 551 (8th Cir. 1981), cert denied, 455 U.S. 1005, 102 S.Ct. 1642, 71 L.Ed.2d 874 (1982); *Brache v. Weschester County,* 658 F.2d 47 (2nd Cir. 1981); *Florida Businessmen for Free Enterprise v. City of Hollywood,* 673 F.2d 1213 (11th Cir. 1982).

intent of the retailer/distributor of items. Consistently the reviewing courts have found that the Model Act is applicable to a party charged in light of the circumstances of an alleged violation. To apply an objective standard, as done by this Court, would clearly permit the unconstitutional transfer of intent of a designer or manufacturer to a retail seller of goods.

This Court unconstitutionally transferred the manufacturer's intent to the defendant retailers in its jury instruction number 37. As a preface to the list of items found at 21 U.S.C. Section 857(d), the instruction stated "The following fifteen sets of items constitute drug paraphernalia". This was clearly in error. In *Camille Corp. v. Phares*, 705 F.2d 223 (7th Cir. 1983) the Court stated, ". . . the object is not classified as drug paraphernalia unless the scienter requirement of Section I(a)(1) is fulfilled". *Id.* at 230. The Fifth Federal Circuit went further by stating, "No item bears the stigma of drug paraphernalia under La.R.S. 40: 1033(A) & (B), absent the sellers intent that it be used with a controlled substance", *Tobacco Accessories and Novelty Craftsman Merchants Ass'n v. Treen*, 681 F.2d 378, 383 (5th Cir. 1982). See also *Murphy v. Matheson*, 742 F.2d 564 at 572 (8th Cir. 1981) (requiring intent of the person charged). Finally, in *Record Revolution #6, Inc. v. City of Parma, Ohio*, 709 F.2d 534 (6th Cir. 1983), the Sixth Federal Circuit proved the non-existence of drug paraphernalia "per se" by review of the definition itself.

> "The court finds that subsection (L) does not purport to define the listed items as drug paraphernalia 'per se' because the general definition of drug paraphernalia includes the phrases 'used, intended for use, or designed for use', which incorporate the criminal defendant's intent into the definition, and because the phrase 'such as' immediately precedes the list, the court finds that the listed items are cited only as examples of items which can be drug paraphernalia if the requisite intent is proved.".

With the *Parma* decision obviously in mind, the office of the Attorney General of Tennessee, in an opinion dated May 22, 1984, stated ". . . it is conceivable that a hoe, rake, pharmacist's bottle, or doggie bag could be deemed to be drug paraphernalia, *but only* if the item in question was shown to be used or intended for use in connection with controlled substances." One might say that nothing is drug paraphernalia but everything can be.

The list of items at 21 U.S.C. Section 857(d) is a suggested list of items that could be drug paraphernalia subject to the requisite intent being proven on the part of an accused. The list of items, therefore, are no more than a suggested guideline without which the law would be unconstitutionally vague.[4]

Most recently, the Southern District of Ohio revisited the issue of whether the suggestive list is a list of drug

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[4] Without the suggestive list, the law becomes devoid of guidelines, (see *Village of Hoffman Estates, Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2 362 (1982), rehearing denied, 456 U.S. 950, 102 S.Ct. 2023, 72 L.Ed.2 476 (1982), and on remand, *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 688 F.2d 842 (7th Cir. 1982)). "Given the importance attached to such guidelines by the *Hoffman Estates* decision, plaintiff contends that the absence of such guidelines renders the West Carrollton ordinance invalid on vagueness grounds. The court must agree with plaintiff", *Philman's, Inc. v. City of West Carrollton*, 577 F.Supp. 1380 (S.D. Ohio 1983).

paraphernalia under a claim that the ordinance at issue violated the Sixth Amendment by establishing a classification of items as 'per se' drug paraphernalia and, thereby, removing the determination of whether or not something is paraphernalia from a judge or jury. The Court, at footnote 9, responds:

> "The Court deems this section of the Ordinance to create at most a rebuttable presumption. Moreover, no exemplar is 'drug paraphernalia' under the Ordinance, absent proof that it fits the general definition of 'drug paraphernalia', and absent proof that, in light of the enumerated factors (and other logically relevant factors), it is 'principally designed or marketed for use' (in the manner specified in the definition of each exemplar) with a controlled substance. Therefore, the Court holds that the items listed are not 'drug paraphernalia' *per se* and that the Ordinance is not unconstitutional on the ground."

Philmans, Inc. v. City of West Carrollton, 577 F.Supp. 1380 (S.D. Ohio 1983).

Numerous courts have looked at 21 U.S.C. Section 857 and have determined the appropriate view of items listed at subsection (d) are on a subjective basis. The Sixth Circuit Court of Appeals required "knowledge that there is a strong probability that [the items will be used illegally]", *U.S. v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955 (6th Cir. 1989), cert denied, 110 S.Ct. 324, 107 L.Ed.2 314 (U.S. 1989). This line of subjective review was adopted by the Western District of New York in *Ryers Creek Corp., d/b/a/ The Mill v. Steven McMartin, et al.,*

CIV-89-157T, April 20, 1989. In *U.S. v. Main Street Distributing, Inc.*, 700 F.Supp. 655, 667 (E.D.N.Y. 1988) the Court found the inclusion of the word "primarily in the scienter section of the statute, appears more likely to benefit than to burden a defendant, by narrowing the scope of the act." The Southern District of New York issued its Memorandum and Order in *U.S. v. Glass Menagerie, Inc.*, 702 F.Supp. 139 (Ky. 1988), which, among other items, reviewed the allegation that the scienter requirement is unclear in 21 U.S.C. Section 857 and raises the prospect that defendants could be convicted of a crime without any showing of intent.

> "This Court is reluctant to declare that this statute, directed as it clearly is against the 'head shops,' is void on its face and in all events as to everybody. At least as to the issue of whether the statute is unconstitutional as applied in other than a 'head shop' situation, and the subsidiary issue of whether Congress has now authorized the manufacturer of dual purpose glassware to be convicted of a federal felony not upon any showing of criminal intent on the part of the actor but only on some inference to be drawn as to the 'primary' intent of some group of unidentified future customers who will or may use the glassware in a nefarious fashion, movants seem to be on firmer ground."

S. 89 Cr. 325 [CLB] U.S.D.C. Southern District of New York (Sept. 6, 1989).

In light of the previously listed applications of 21 U.S.C. Section 857 and the consistent finding of the subjective nature of the law, only one Court has previously found the federal law to be objective in nature. (See *U.S.*

v. Dyer, et al., Criminal No. 90183-A, U.S.D.C. for the Eastern District of Va., Sept., 1990).

BRIEF POINT III

The Defendants have asked that the Court set aside their convictions on Counts IV, V and IX and specifically calls to the Court's attention that those counts involve the allegations that the Defendants were engaged in the aiding and abetting of certain individuals in the manufacture and distribution of cocaine a schedule II controlled substance. That allegation is the predicate act for Counts V and IX and forms the basis of allegations contained in Count IV as well.

In Count IV the Defendants were charged with specifically, knowingly and intentionally aiding and abetting Randy Kennedy in the manufacture and distribution of cocaine between November 4, 1989 up to and including November 25 of 1989.

The Defendants call to the Court's attention that there was no evidence from Randy Kennedy whatsoever that he ever dealt with, saw, or purchased any substance from these Defendants during the period of time alleged in Count IV in the indictment. In addition, the Court will recall that the testimony was unequivocal at least as to George Michael Moore, that Randy Kennedy never saw him, dealt with him, talked to him nor, did the Defendant aid Randy Kennedy in any respects in the manufacture and/or distribution of cocaine whatever. In fact, with respect to aiding and abetting and the distribution and manufacture of cocaine, there isn't any evidence from any person whoever indicated that Defendants knowingly

and intentionally did any act which would have aided and abetted the knowing and intentional manufacture and distribution of cocaine.

In fact, as to Defendant George Michael Moore no witness on behalf of the Government who sold or distributed drugs and appeared at the trial hereof ever testified that George Michael Moore ever sold them anything. As to both of these Defendants, the record is clear. There is no evidence that exists nor was any propounded which would indicate that the Defendants had any specific knowledge or any intention whatever to aid and abet in the manufacture and/or distribution of cocaine.

The Court's attention is respectfully called to *United States of America v. Philip William Pace*, a case which was decided on the 18th of December of 1990 by the Eighth Circuit. A copy of the opinion is attached hereto and by this reference made a part hereof. In the *Pace* case, the evidence against the Defendant was far more onerous and compelling than the case at bar. In the *Pace* case the Defendant was the driver of the station wagon which was traveling from Los Angeles to Chicago. It was not the first trip for Mr. Pace. Mr. Pace was stopped for speeding and upon a search, 200 pounds of cocaine was found in the vehicle. That cocaine was in kilograms of bricks and were found in two duffle bags in the floorboard of the back seat, a duffle bag in the cargo area and a suitcase in the cargo area. Another vehicle was following Pace and his companion, Mason, and had been for the past day and one-half when Pace and Mason were arrested. That vehicle was a black van with two people in it, one of whom was a Columbian. Pace was told by Mason that the reason

that the van was making the trip with him was none of his business and wasn't any of his concern.

Pace was acquitted of conspiracy but convicted of possession with the intent to distribute cocaine. The Eighth Circuit reversed and held that under those circumstances the evidence was insufficient to justify a reasonable inference that Pace knew he was driving a car full of cocaine. The Court held that there wasn't sufficient evidence on the record to support a guilty verdict. The opinion was written by Justice Arnold with Justice Fagg concurring. Justice Magill dissented and laid out all of the facts showing all of the inferences that are readily apparent from it.

Defendants here believe that the *Pace* case is square on point. It is a case dealing with guilty knowledge and proof thereof. The facts of the *Pace* case are far more compelling against Defendant Pace than the facts in this case against Defendants Acty and Moore.

A fair understanding of all of the evidence and looking at it in the light most favorable to the Government, discloses without contradiction that not one witness, be it Randy Kennedy, Mr. Searles or any other person ever testified that either of these Defendants knew and intentionally sold any substance which they knew and intended the aiding and abetting of those individuals in the manufacture and distribution of cocaine.

This Court should grant the Defendants' motions with respect to Courts IV, V and IX.

The Defendants have seriously contested the existence of sufficient proof by the Government as to any

specified unlawful activity as an underpinning for the submission to the jury of the money laundering counts in this case.

As a minimum, it is clear by everyone's account that no allegation of a drug paraphernalia violation prior to November 18, 1988 under 21 U.S.C. Section 857 can serve as the predicate for a violation of either 18 U.S.C. Section 1956 or Section 1957. This is so since until November 18, 1988, violations of 21 U.S.C. Section 857 were not a specified unlawful activity under either of the aforementioned money laundering statutes. See *1988 Amendment to 18 U.S.C. Section 1956, Publ. L. 100-690 Section 6466.*

The alleged violations of 21 U.S.C. Section 1957 (Counts 7 and 8) are subsequent to November 18, 1988. However, there was no showing in this record that the proceeds used in those transactions were criminally derived from specified unlawful activity.

Count 7 (an alleged violation of 21 U.S.C. Section 1957) involved the acquisition of an automobile. The Government's own records (Exhibits 196-204) evidenced that the monies used for the purchase were a repayment of a documented loan transaction between Defendant Moore and the corporation.

Further, the record in this case reveals an abundance of evidence of untainted funds in the individuals and corporations hands.

Defendants' Exhibit ___ reveals the large dollars generated in World Wide Imports through the sale of art.

Testimony revealed the same. In addition, the Government's own proof through the trial revealed funds coming into the corporate account as a result of loans, individual repayments of loans, interest income, rentals, etc.

Simply put, for all the reasons advanced herein, the Government made no showing (absent speculation) that the transactions involved in Counts 7 and 8 were in criminally derived property and that said criminally derived property came from a specified unlawful activity.

The best of the Government's proof, taken in its best light, is that some unspecified amount of money derived from the sale of items deemed to be drug paraphernalia was from time to time present in the account of World Wide Imports. There is absolutely no showing as to what those amounts were, whether those amounts, if any, were a part of the proceeds used to purchase the automobile (Count 7) or the Dean Witter fund (Count 8), or indeed what amounts, if any, were derived after November 18, 1988.

Although involving the separate laundering statute of 18 U.S.C. Section 1956, the deficiencies in the Government's proof on Count 6 are the same as those with Counts 7 and 8. In short, there is no showing whatsoever as to the source of the *proceeds* involved in the transaction complained of in Count 6.

Additionally, since Count 6 alleges a violation of 21 U.S.C. Section 1956(a)(1)(A)(i), it was incumbent on the Government to establish that the financial transaction conducted in the instance alleged in Count 6 was "with

the intent to promote the carrying on of specified unlawful activity." See 21 U.S.C. Section 1956(a)(1)(A)(i). The best the Government has to show for their efforts in that regard is that monies were spent out of the account of World Wide Imports for the purchase of items from an unindicated manufacturer and distribution company which sold numerous items, some of which were alleged to be drug paraphernalia. Given the fact that the evidence establishes that the distribution company sold many more items than those considered by the Government to be drug paraphernalia, it seems logical to assume that the Government would have the burden to show that the funds dispersed went for drug paraphernalia items, otherwise the transaction would not serve to "promote the carrying on of unlawful activity." This the Government failed to prove. Absent the jury guessing as to what was purchased, there is nothing.

The Court's submission of Count 9 raises issues both identical to those raised by Defendants concerning Counts 6, 7 and 8 and additional ones as well.

Count 9, charging a conspiracy to money launder under 18 U.S.C. Section 1956, was not proven in several respects.

First, since Count 9 alleges that the conspiracy to launder money occurred between January 21, 1987 and March 28, 1990, the questions raised as to the source of the proceeds, the use of the proceeds, etc. are precisely those raised by Defendants in their objections to Counts 6, 7 and 8.

In addition, the method of the charge in Count 9 obligates the Government to prove that the transactions

complained of in the conspiracy involved proceeds from both types of specified unlawful activity alleged, to wit: violation of 21 U.S.C. Section 857(a) and 21 U.S.C. Section 841(a)(1). The Government alleged, simply, that the illegal transaction involved proceeds from both drug paraphernalia violations and drug violations.

The Government specifically elected in Count 9 to charge that the Defendants to the conspiracy conducted the complained of transactions not just to promote the specified unlawful activity but, also, with the intent to disguise the nature, location, source, ownership and control of the proceeds. (See 18 U.S.C. Section 1956(a)(1)(B)(i)).

The Government alleged that in furtherance of the conspiracy charged, the Defendants, or one of them, committed at least one of three overt acts. Alleged Overt Act (a) is really Count 7. Alleged Overt Act (b) is really Count 8. Alleged Overt Act (c) is a $45,000 transaction occurring on September 25, 1988, which predates the applicable date of 18 U.S.C. Section 1856 to violations of 21 U.S.C. Section 857.

Remembering that the Government has alleged in Count 9 that the transactions in the conspiracy were done both to promote the specified unlawful activity and with the intent to disguise, etc., it would be helpful to analyze the proof at trial as to each act.

It can hardly be argued that on March 25, 1989 an automobile was purchased (Overt Act A) to promote any specified unlawful activity. Equally clear is the fact that Chris Acty's depositing $100,000 in a money market fund

(Overt Act B) has nothing to do with promoting any specified unlawful activity.

Overt Act (C) is a transaction (September 25, 1988) predating the effective date of specified unlawful activity including violation of 21 U.S.C. Section 857(a). Even without that absolute prohibition, there wasn't anything about that transaction that could, in any way, be seen to promote the specified unlawful activity.

Since the Government alleged in the conjunctive, the illegal purposes of the transaction, and inasmuch as there exists no proof that any act was done in an effort to promote the specified unlawful activity, the Court should conclude that the Government's proof has wholly failed.

If the Court concludes that in this instance even though a necessary element was alleged in the conjunctive it can be proved in the disjunctive, that proof failed as well.

Out of all that is unclear and muddled in this case, the one clear fact is that there existed no proof whatsoever that either Defendant in any way, shape, or form attempted to conceal and disguise the nature, location, source, ownership and control of any proceeds. The contrary is clear. The Government was literally able to reconstruct with actual records of the Defendants and the corporations an accounting as to where literally every dollar earned went. In no instance were phony names or accounts used. No straw person was employed. No hidden transaction surfaced. Even the Government's witness Semesky conceded that there was nothing out of the ordinary or suspicious about any of the transactions. His complaint was limited to the source of the funds.

The mental image one gets from the term "money laundering" is literally the equivalent of its statutory definition. They both involve activity that quite simply is intended to hide and alter and deceive. It didn't happen here.

Additionally, over timely objection, the Government was alleged to elicit opinion evidence from Donald Semesky to the effect that the monetary transaction of the Defendants violated the provisions of 21 U.S.C. Sections 1956 and 1957. Those opinions were impermissible legal conclusions. *Shahid v. City of Detroit,* 889 F.2d 1543 (6th Cir. 1989). In addition to his expression of these impermissible legal conclusions, the stated basis for his conclusions involved conclusions of law. For in addition to his expert opinion that the Defendants' actions constituted money laundering, he offered as his basis for that opinion that a violation of 21 U.S.C. Sections 1956 and 1957, was complete when the money was deposited from the business to the account of World Wide Imports.

In addition to the expression of impermissible legal conclusions, the testimony of the witness Semesky should not have been permitted because it was of no aid to the jury and served only to unduly emphasize and stamp with the approval of an expert, the Government's theory.

Although an objection that an opinion deals with the ultimate issue is not sufficient anymore, the opinion must aid the jury. *Zimmer v. Miller Trucking Co.,* 743 F.2d 601 (8th Cir. 1984):

> "Specialized knowledge was not necessary in this case. With the facts and circumstances of the accident before it, the jury was competent to make a decision without superfluous expert opinion evidence."

Also see *Otwell v. Motel 6, Inc.,* 755 F.2d 665 (8th Cir. 1985).

In the instant case, the jury had before it each and every item of documentary evidence, testimony and demonstrative evidence imaginable laying out each and every monetary transaction the Defendants had engaged in over the last several years.

It was for the trier of fact to review and consider that evidence to determine whether (1) the financial transactions promoted any specified unlawful activity and (2) the transactions they can see themselves were intended to conceal and disguise . . .

To hold otherwise would, under these facts, be tantamount to allowing every case to be decided by experts. Simply recite the facts as one understands them and ask the expert whether or not the Defendant violated the statute.

LAW OFFICES OF
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ATTORNEYS FOR DEFENDANTS

Copy to:

Kevin VanderSchel
Assistant U.S. Attorney
115 U.S. Courthouse
East First and Walnut
Des Moines, Iowa 50309

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was

_ personally delivered

X mailed

upon all parties to the above-entitled cause at their respective addresses on the 4th day of February, 1991.

/s/ Pam Hatfield

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. POSTERS 'N THINGS LTD., and Iowa Corporation, d/b/a WORLD WIDE IMPORTS, d/b/a FORBIDDEN FRUIT, d/b/a ACTY-MOORE GALLERY; GEORGE MICHAEL MOORE, a/k/a MIKE MOORE, d/b/a G. MICHAEL MOORE ENTERPRISES; and LANA CHRISTINE ACTY, a/k/a CHRIS ACTY, Defendants.	)	CRIMINAL NO. 90-33 RULING ON DEFENDANTS' MOTIONS FOR NEW TRIAL AND JUDGMENT OF ACQUITTAL (Filed 91 MAR 21)

Jury trial in this case ended with verdicts returned by the jury on December 28, 1990, finding guilty the defendants charged in Counts 1 through 9 of the Second Superseding Indictment. (Not all counts charged both defendants with criminal conduct.) Before the court for ruling are the defendants' motions for new trial and judgment of acquittal notwithstanding the verdicts. The court concludes the motions are without merit. The motions are denied.

Before trial defendants challenged the charges in the indictment by filing motions to dismiss that were denied. During trial defendants challenged much of the government's evidence, presented evidence that was excluded,

and excepted to the jury instructions and the court's failure to give their proposed jury instructions.

At the close of the government's case, and after all parties rested, the defendants moved for judgment of acquittal as to each of the nine counts of the indictment.

The court has now reviewed its rulings on evidentiary issues and confirms its previous rulings. The court has reviewed the jury instructions and concludes they were not flawed. The court overrules the motion for new trial to the extent that it is based on allegedly erroneous jury instructions and assigned errors in the receipt or exclusion of evidence. To the extent the motion for new trial raises the same issues that were previously presented before trial or during trial, the motion is denied for the reasons given for previous rulings.

The court submitted this case to the jury because it concluded the evidence was sufficient for reasonable jurors to find each defendant guilty as charged on the nine counts of the indictment. Because the evidence was sufficient, the court overrules the defendants' motion for judgment of acquittal notwithstanding the verdict. In making this ruling, the court applies the principles governing motions for directed verdict that were recently explained in *United States v. Pace*, decided by the Court of Appeals for the Eighth Circuit on December 18, 1990, at pages 7-8 of that opinion. Defendants argue that case supports their motion for judgment of acquittal, but the court finds *Pace* inapposite, sharing little in common with the facts in this case.

One additional issue presented in the defendants' motion for new trial deserves further comment. Defendants contend that they were deprived of a fair jury trial because twelve persons on the petit jury panel as of December 7, 1990, were excused from further jury service after completing their service in the case of *United States v. Goddard*, Criminal No. 90-101. This court's record made in the *Goddard* case, and its order entered in that case on December 14, 1990, explain that the twelve jurors were excused from further service after being unable to reach a verdict in the *Goddard* case. The case would have been retried, and the court and counsel in that case thought it best that the jurors not be in the array of jurors for the retrial. Although the parties and counsel in the *Goddard* case were consulted before those twelve jurors were excused from further jury service, the court subsequently learned from consultation with Chief Judge Harold D. Vietor that a proper record had not been made. Consequently the undersigned judge entered the order of December 14, 1990 (Exhibit "A" attached to defendants' motions here), returning those jurors to the list of jurors available for further jury service in this case.

The undersigned judge acknowledged in the December 14 order its error in excusing the *Goddard* jurors without making a proper record. But the *Goddard* jurors were excused after the clerk of court had already selected the jury panel to report for this *Posters 'N Things* case. The *Goddard* jurors were not included in that panel. Because the jurors selected for participation in this case were selected before this court excused from further service the *Goddard* trial jurors, the defendants have failed to demonstrate that this court's order in the *Goddard* case adversely

affected them in any way. Passing the question whether defendants in this case properly and timely raised this objection (*see* 28 U.S.C. §§ 1866-67), the court concludes that defendants have failed to demonstrate they were deprived of a fair jury array or fair jury trial in this case. It is plain that none of the twelve jurors excused on December 7, 1990, would have been in the jury array even if the court had not excused them on that day.

For the reasons presented in ruling on previous motions, objections, and exceptions before and during the trial, the court denies defendants' motions for new trial and for judgment of acquittal notwithstanding the verdict.

IT IS SO ORDERED.

Dated this 21st day of March, 1991.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN District of IOWA

UNITED STATES OF AMERICA V. POSTERS' N THINGS LTD., an Iowa Corporation, (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE** **(For Offenses Committed On or After November 1, 1987)** Case Number: Cr. 90-33-01 (Filed June 11, 1991) Robert T. Vaughn Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) 1, 2 and 3 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:857(a)(1)	Use interstate conveyance for sale drug paraphernalia	8-17-89	1 & 2
18:371	Conspiracy to use interstate conveyance for sale of drug paraphernalia	3-28-90	3

The defendant is sentenced as provided in pages 2 ~~through~~ _____ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 600.00, for count(s) 1, 2 and 3, which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:

Defendant's Date of Birth:

Defendant's Mailing Address:

_____

_____

Defendant's Residence Address:

_____

_____

cc: to Customs, IRS, Postal

June 7, 1991
Date of Imposition of Sentence

/s/ Charles R. Wolle
Signature of Judicial Officer

CHARLES R. WOLLE,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

June 11, 1991
Date

FINE

The defendant shall pay a fine of $ 75,000.00. xxx

[x] This amount is the total of the fines imposed on individual counts, as follows:

Counts 1, 2 and 3. $75,000.00 on each count, ordered concurrently.

* * *

This fine plus any interest required shall be paid:

[ ] in full immediately.

[x] in full not later than July 1, 1991, unless notice of appeal is filed, then within ten (10) days after final judgment is entered on the sentence following decision or other disposition of the appeal.

Interest will be payable from July 1, 1991 until paid in full.

* * *

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

UNITED STATES DISTRICT COURT

SOUTHERN **District of** IOWA

UNITED STATES OF AMERICA

V.

LANA CHRISTINE ACTY
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
Cr. 90-33-03
(Filed June 11, 1991)
Robert T. Vaughn
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8 and 9 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:857(a)(1)	Use interstate	8-17-89	1
" "	conveyance for sale drug paraphernalia	11-8-89	2
18:371	Conspiracy to use interstate conveyance for sale of drug paraphernalia	3-28-90	3 & 9

21:841(a)(1) and 18:2	Aid & abet manufacture & dist. cocaine	11-25-89	4
21:854	Investment of illicit drug profits	3-28-90	5
18:1956 (a)(1)(A)	Laundering monetary instruments	11-8-89	6
18:1957& 18:2	Engage in monetary trans. in prop. derived spec. unlawful activity	3-25-89 2-9-90	7 8
" "			

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 450.00, for count(s) 1, 2, 3, 4, 5, 6, 7, 8 and 9, which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
578-64-2213

Defendant's Date of Birth:
12/12/48

Defendant's Mailing Address:

3500 Eula Drive
Urbandale, Ia 50312

Defendant's Residence Address:

June 7, 1991
Date of Imposition of Sentence

/s/ Charles R. Wolle
Signature of Judicial Officer

CHARLES R. WOLLE,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

June 11, 1991
Date

cc: Customs, IRS, Postal

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 108 months on each of counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 to run concurrently with each other.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 150,000.00. The fine includes any costs of incarceration and/or supervision.

* * *

This fine plus any interest required shall be paid:

[ ] in full immediately.

[x] in full not later than July 1, 1991, unless notice of appeal is filed then within ten (10) days after final judgment is entered on the sentence following decision or other disposition of the appeal. Interest will be payable from July 1, 1991 until paid in full.

* * *

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): As stated on the record at sentencing. In summary, the Court finds that $1,500,000 of the defendant's moneys laundered

were the proceeds of an unlawful activity under guideline 2S1.1(b)(2). The amount of cocaine attributable to defendant under count IV, aiding and abetting, is 100 kilograms of cocaine, consisting of the dilutants sold by defendant and cocaine mixed in by others.

Guideline Range Determined by the Court:

Total Offense Level: 31 (By reason of grouping with departure explained below)

Criminal History Category: I

Imprisonment Range: 108 to 135 months.

Supervised Release Range: ___ ~~to~~ 5 years

Fine Range: $ 15,000 to $ 150,000

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ --------

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following reason(s): As stated on the record at sentencing. In summary, the Court departs pursuant to Policy Statement 5K2.0 by not including in the grouping of counts the aiding and abetting conviction under count IV. The Court finds that the Sentencing Commission, in determining the appropriate range for aiding and abetting sale and manufacture of controlled substances, did not have in mind nor adequately provide a lower range for the type of circumstances involved here. This is essentially a drug paraphernalia and money laundering case, not a case of aiding and abetting a specific act of manufacturing or distributing controlled substances. The heartland is the range provided by the guidelines for money laundering in connection with sale of drug paraphernalia, not the aiding and abetting of manufacture and sale of cocaine.

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF IOWA

NOTICE OF APPEAL

United States of America, Plaintiff,
vs.
Lana Christine Acty, Defendant.

Criminal No. 90-33
District Court Docket No.

Charles R. Wolle
District Court Judge

(Filed June 18 1991)

Notice is hereby given that Lana Christine Acty appeals to the United States Court of Appeals for the Eighth Circuit from the:

[X] Judgment & Commitment
[ ] Order _____
Specify

entered in this action on June 7, 1991.
Date

/s/ Robt. T. Vaughn
Signature of Defendant's Counsel

1126 Eastdale Avenue
Street Address Room No.

Nashville Tennessee 37216
City State Zip Code

Robert Thomas Vaughn
Typed Name of Counsel

(615) 228-9422
Telephone Number

408-88-0558
Social Security Number
(For all CJA compensation)

June 13, 1991
Dated

TRANSCRIPT ORDER FORM

TO BE COMPLETED BY ATTORNEY FOR APPELLANT.*

[X] Please prepare transcript of
- [ ] Pre-trial proceedings
- [X] Testimony or
- [X] Portions thereof
- [X] Sentencing
- [X] Post-trial proceedings
- [ ] Other _____

[ ] I am not ordering a transcript:
Reason:
- [ ] Previously filed.
- [ ] Other _____

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that copies of this notice of appeal/transcript order form have been filed/served upon U. S. District Court, court reporter, and all counsel or record, and that satisfactory arrangements for payment of cost of transcripts ordered have been made with the court reporter. (FRAP 10(b)). Method of payment: [X] Funds/client cash [ ] CJA Form 24, completed and attached.

Attorney's signature /s/ Robt. Vaughn
Date June 13, 1991

* NOTE: Complete all items on reverse side.

INFORMATION SHEET

TO BE COMPLETED BY ATTORNEY FOR APPELLANT.

1. Defendant's Address: 3500 Eula Drive, Urbandale, Iowa 50322

2. Date of Verdict: December 28, 1990 Jury X
   Nonjury_____

   Offenses: 18 USC 2, 18 USC 371, 18 USC 1956 (a)(1)(A), 18 USC 1957, 21 USC 841 (a)(1), 21 USC 857, 21 USC 857 (a)(1)

   Trial Testimony
   Number of Days 13 Bail Status: $25,000.00

3. Sentence and Date Imposed: Guilty to complete 9 count indictment with defendant to serve 108 months, $150,000 fine, 5 year probation; June 7, 1991

4. Date Trial Transcript Ordered by Counsel or District Court: June 13, 1991

   Stenographer in Charge (Name Address, and Telephone No.): Susan Klus, 606 First Interstate Bank Building, Des Moines, IA 50309; (515) 243-6596

5. Trial Counsel was [ ] appointed. [X] retained.

   Does Defendant's financial status warrant appointment of counsel on appeal? No

   Affidavit of financial status filed: N/A

   Is there any reason why trial counsel should not be appointed as counsel on appeal? N/A

6. Assistant United States Attorney and His FTS Number: Lester A. Paff; FTS # 8626257

* * *

COURT REPORTER ACKNOWLEDGMENT

_____
Date Order Received

_____
Estimated Completion Date

_____
Estimated No. Pages

_____
Court reporter's signature

_____
Date

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 8, 1993

Alfredo Parrish, Esq.
3939 Grand Avenue
Des Moines, Iowa 50312

Re: 92-903 – Posters 'N' Things, Ltd., et al. v. United States

Dear Mr. Parrish:

The Court today entered the following order in the above stated case:

"The petition for a writ of certiorari is granted."

Enclosed are Memoranda describing the time requirements and procedures under the Rules, together with a Specification Chart for your use. Also, enclosed is a recently published guide to assist you in preparing your case before this Court.

Although these cases will not be argued this Term, please note that the Court prefers to have the cases briefed prior to its recess in June.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Assistant Clerk

Enclosures

Supreme Court, U.S.
FILED
APR 21 1993

No. 92-903

In The

Supreme Court of the United States

October Term, 1992

POSTERS 'N' THINGS, LTD., and
LANA CHRISTINE ACTY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS

ALFREDO PARRISH
ELIZABETH KRUIDENIER
2910 Grand Avenue
Des Moines, Iowa 50312
(515) 284-5737

Attorneys for Petitioners
Posters 'N' Things, Ltd.
and Lana Christine Acty.

April 21, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857, is unconstitutionally vague, as applied in this case.

(2) Whether the Mail Order Drug paraphernalia Control Act, 21 U.S.C. § 857, contains a subjective scienter requirement which would require, as a prerequisite to a conviction, proof that a retailer intended that the items be used for illegal drugs.

(3) Whether items considered as per se drug paraphernalia pursuant to an objective standard of 21 U.S.C. § 857 can be used as a basis for a violation under 21 U.S.C. § 841(a)(1).

(4) Whether the proof at trial below was adequate for a jury to find guilt under 21 U.S.C. § 841(a)(1).

LIST OF PARTIES

The Petitioner is Posters 'N' Things, Ltd. and Lana Christine Acty. The Respondent is the United States of America.

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No. 92-903

In The

Supreme Court of the United States

October Term, 1992

POSTERS 'N' THINGS, LTD., and
LANA CHRISTINE ACTY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 969 F.2d 652. The opinion of the District Couirt is not reported.

JURISDICTION

The Court of Appeals for the Eighth Circuit ("Eighth Circuit") filed its judgment on July 14, 1992. On August 17, 1992, the Eighth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc. A petition for

writ of certiorari was filed on November 11, 1992 and was granted on March 8, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides, in part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

In March of 1990, United States Government Customs agents with special agents, along with agents for the Internal Revenue Service, seized from a merchant, Posters 'N' Things, Ltd., retail store inventory items alleged to constitute drug paraphernalia as defined by the Mail Order Drug Paraphernalia Control Act ("Drug Paraphernalia Act") in violation of 21 U.S.C. § 857. The items to be seized, included, but were not limited to, all materials of any kind which were *primarily intended* for use in manufacturing, compounding, processing, or preparing a controlled substance including "cuts." The search warrant specifically cited mannitol, procaine, and inositol as drug paraphernalia. All the seized items were in their original packaging; none had yet been used.

All of the items seized, including pipes, scales, vitamins and diet aids have legitimate uses. While the warrant sought items primarily intended for use with

controlled substances, the jury was instructed, under Jury Instruction number 37, that the items of evidence including, but not limited to, those listed under 21 U.S.C. § 857(d)(1)-(15), were per se drug paraphernalia. Under this objective approach, the intent of the Petitioners was deemed not relevant to their guilt or innocence under the Drug Paraphernalia Act. The items offered into evidence included mannitol, mannite, and inositol whose sale as drug paraphernalia the government alleged was violative of 21 U.S.C. § 841(a)(1), the statute prohibiting the manufacture of distribution of a controlled substance. The government's witnesses testified that drug paraphernalia was to be determined on a subjective basis with the guilt of the Petitioners to be determined in light of their intent. The government's witnesses stated that the substances mannitol, mannite, or inositol were drug paraphernalia.

Both Petitioners were found guilty on all nine counts. Petitioner Acty was sentenced to 108 months in prison on each count, to be served concurrently. Petitioner Posters 'N' Things was fined $75,000, with a special assessment of $600, for a total amount due of $75,600.

Both Petitioners filed a Notice of Appeal, and an appeal was filed before the United States Court of Appeals for the Eighth Circuit on December 9, 1991 challenging the constitutionality of all of the drug paraphernalia-related charges as well as the sufficiency of the evidence on the money laundering count. On July 13, 1992, a three-judge panel of the Eighth Circuit affirmed Petitioners' conviction and sentence. On August 17, 1992, the Eighth Circuit denied Petitioners' application for rehearing and rehearing en banc.

Petitioners filed a Petition for Writ of Certiorari with the United States Supreme Court on November 16, 1992. The Petition was granted on March 8, 1993.

SUMMARY OF ARGUMENT

The Petitioners were convicted of violations of the Mail Order Drug Paraphernalia Act (four (4) counts for Petitioner Acty, three (3) counts for Petitioner Posters 'N' Things). Acty was found guilty of two (2) counts of aiding and abetting the manufacture and distribution of cocaine and three (3) money laundering counts.

As the District Court noted in the judgment, each count was related to the underlying drug paraphernalia charges. Petitioners contend that the Mail Order Drug Paraphernalia Control Act must be read to contain a subjective scienter element. Failure of the Act to contain such an element must render the Act unconstitutional in violation of the Due Process clause. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The Eighth Circuit incorrectly interpreted the Act to contain an objective scienter and upheld Petitioners' conviction despite no proof that the Petitioners intended the items at issue to be used in connection with illegal drugs.

The jury was not even allowed to determine for itself whether certain items were *in fact* drug paraphernalia. Because of this error, Petitioners' conviction under counts 1, 2, 3, 4, 5, 7, 8, and 9 must be reversed. Since those counts form the underlying criminal conduct for the

money laundering charge of count 6, that remaining count must also be reversed.

ARGUMENT

I. THE MAIL ORDER DRUG PARAPHERNALIA CONTROL ACT MUST CONTAIN A SCIENTER REQUIREMENT IN ORDER TO BE CONSTITUTIONAL

Since the enactment of the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857, the federal courts have split as to whether the act contains a subjective scienter requirement. The Second Circuit Court of Appeals held that the act contained a scienter requirement. *United States v. Schneiderman*, 968 F.2d 1564 (2nd Cir. 1992). The Sixth Circuit, in *United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955 (6th Cir. 1989), also read the act to include a scienter requirement, as did the Tenth Circuit in *United States v. Murphy*, 977 F.2d 503 (10th Cir. 1992).

The Eighth Circuit Court of Appeals in this case, however, held that the act expressly did not contain a subjective scienter requirement. Instead, the Court held that objective design features of alleged drug paraphernalia were sufficient to establish a defendant's intent to violate the act.

21 U.S.C. § 857 provides in part:

(d) Definition of "drug paraphernalia"

The term "drug paraphernalia" means any equipment, product, or material of any kind

> which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body.

The statute lists examples of specific items such as pipes, miniature spoons and bongs which might fit the definition of paraphernalia.

The Eighth Circuit held that the "designed for use" language of the statute created an "objective scienter" sufficient to uphold a conviction. Such an interpretation is at odds not only with the other Circuit opinions concerning the act, but also with a key principle of Anglo-American criminal jurisprudence requiring proof of intent in criminal prosecutions.

a. An Objective Scienter is Disfavored in Criminal Law

It is the Petitioners' contention that Section 857 must be read to contain a subjective scienter requirement in order for the act to meet constitutional requirements. "[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. Freed*, 401 U.S. 601, 613, 91 S.Ct. 1112, 1120 (1971) (Brennan, J., concurring), quoting *Dennis v. United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 862 (1951). Even though a statute may not contain an express scienter requirement, that "does not signal a departure from the background assumption of our criminal law" that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.' " *Liparota v. United States*, 471 U.S. 419, 426 (1985), quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

This disfavored status was, in fact, one of the motivating factors for courts to read a subjective scienter requirement into Section 857.[1]

It is axiomatic that a finding of criminal liability usually requires a finding of mental culpability. *Morisette v. United States*, 342 U.S. 246, 250-52, 72 S.Ct 240, 243-44, 96 L.Ed. (1952). While Due Process does permit the imposition of strict liability in the criminal context, it is an exception generally limited to statutes and offenses that are regulatory in nature. *Id.*, 342 U.S. at 260. In addition, where strict liability has been imposed in the criminal context, there exists a bright line between legal and illegal conduct.[2] The definition and determination of drug

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[1] "The absence from Section 857 of the Model Act language does not override the presumption in favor of requiring scienter, especially in light of other textual support that Congress intended that Section 857 include a scienter element." *Schneiderman*, 968 F.2d at 1567. See also *57,261 Items of Drug Paraphernalia*, 869 F.2d 955 (6th Cir. 1989).

[2] See *United States v. Allard*, 397 F.Supp. 429, 432 (D. Mont. 1975) (First Offense for selling golden eagle feathers was a misdemeanor where there was no possible dispute as to what constituted a "golden eagle feather"); *United States v. Atkinson*, 468 F.Supp. 834 (E.D. Wisc. 1979); *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301 (1922).

paraphernalia, however, is far from clear. Legal tobacco accessories or electrical clamps can be used for smoking marijuana and thereby become drug paraphernalia. Vitamins, diet aids, or other chemicals can be used as cutting agents and thereby become drug paraphernalia.

Section 857 is clearly aimed at products with otherwise legitimate uses, and is therefore not a statute "where the standard imposed is, under the circumstances, reasonable, and adherence thereto properly expected of a person." *United States v. Holridge*, 282 F.2d 302, 310 (8th Cir. 1960); *United States v. Freed*, 401 U.S. at 613, n. 4, 91 S.Ct. at 1120. The lack of a clear standard to be applied leaves legitimate businesses and individuals open to arbitrary, erratic, and discriminatory arrests, prosecutions, convictions, and property seizures.

b. Drug Paraphernalia Laws Historically Have Been Required to Contain Proof of Subjective Scienter.

Efforts to outlaw drug paraphernalia began in the state courts in the 1970's. Note, *Paraphernalia for Marijuana and Hashish Use: Possession Statutes and Indiana's Pipe Dream*, 10 Val. U.L. Rev. 353, 354 n. 15 (1975-76). State and local laws against paraphernalia sales and possession were frequently overturned in court as unconstitutionally vague. *Id.* at 593, 594. The void-for-vagueness doctrine has two elements: a citizen's right to fair notice of what is prohibited, and, more importantly, the establishment of minimum guidelines to govern law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goquen*, 415 U.S. 566, 574 (1974) (citations omitted)).

The difficulty with drug paraphernalia statutes is that the items used in conjunction with illegal drugs generally have legitimate uses. State and local drug paraphernalia statutes, because of this dual use element, were often successfully challenged as being unconstitutionally vague. See *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980). The statue in *Geiger* prohibited the "possession, sale, transfer . . ." of a "drug related device." *Geiger*, 618 F.2d at 27. The statute defined "drug related device" as "any pipe or other object suitable to be used for smoking a controlled substance" with one of five enumerated characteristics. In ruling that the statute was not sufficiently clear to meet due process requirements, the *Geiger* court noted that whether an object was suitable to be used for smoking a controlled substance depended primarily on the ingenuity of drug users. *Id.*, 618 F.2d at 29. See also *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D. Mich. 1980); *Magnani v. City of Ames, Iowa*, 493 F.Supp. 1003 (S.D. Iowa, C.D. 1980); *Record Museum v. Lawrence Township*, 481 F.Supp. 768 (D.N.J. 1979).

Without adequate guidance in the laws as to what illegal paraphernalia was, both retailers and law enforcement agencies were left in question as to what products were and were not prohibited. Those State laws were therefore constitutionally invalid.

c. The Model Act Was Created to Address Constitutional Deficiencies

In 1979, the Drug Enforcement Administration (DEA) of the Department of Justice drafted a model proposal for state legislatures in an attempt to create an effective

paraphernalia law which would withstand constitutional challenge. Note, *The Model Drug Paraphernalia Act: Can we Outlaw Head Shops – And Should We?*, 16 Geo. L. Rev. 137, 139 (1981).

The key to the Model Act is the definition of paraphernalia used to avoid a void for vagueness attack.[3] First, the act generally defines paraphernalia as items used or intended for use with controlled substances. Next, the act contains a nonexclusive list of items included in this definition. Then, the act lists fourteen factors courts can consider in determining if an item is in fact paraphernalia. Finally, the act specifically requires proof that a defendant *intended* to sell drug paraphernalia.

A similar law was interpreted by this court to contain a subjective scienter requirement. See *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). *Hoffman Estates* upheld a "designed or marketed for use" definition of paraphernalia in a pre-enforcement challenge to a civil licensing regulation. *Id.*, 405 U.S. at 506.

State laws based on the Model Act uniformly were interpreted to contain a subjective scienter element. In *New England Accessories Trade Association v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982), the Court held that the act

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[3] For a full citation of the Model Act, including comments, see *Model Drug Paraphernalia Act: Hearing before the Select Committee on Narcotics Abuse and Control, House of Representatives*, 96th Cong. 1st Session, pp. 88-95 (1979).

required proof of scienter on the part of the charged defendant. *Id.*, at 6.

In *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), the Eighth Circuit was faced with an action by wholesale and retail distributors challenging the constitutionality of a Nebraska statute prohibiting the sale and manufacture of drug paraphernalia. The Court, in upholding the constitutionality of the statute, held that the phrase "intended for use" in the statute referred to the intent of the person charged with the violation. *Id.*, at 559. A similar ruling was also made by the Fifth Circuit in *Tobacco Accessories and Novelty Craftsmen Merchants Association of Louisiana v. Treen*, 681 F.2d 378 (5th Cir. 1982). See also *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (1981).

In *Hoffman Estates* the Supreme Court specifically stated that proof of scienter on the part of the defendant was a requirement in order to prevent the statute from being considered void for vagueness. *Id.*, footnote 17. The ordinance at issue in *Hoffman Estates* required a business to obtain a license prior to selling any items "designed or marketed for use with illegal cannabis or drugs." *Id.*, 455 U.S. at 491, 102 S.Ct. at 1189. The Plaintiff in that case raised a pre-enforcement challenge to the facial constitutionality of the ordinance. *Id.*

Justice Marshall, writing for the majority of the Court, rejected the facial challenge, specifically citing the scienter requirement contained in the phrase "marketed for use." *Id.*, 455 U.S. 499-500, 102 S.Ct. 1194. The Court noted that, while the District Court "apparently relied on the growing vernacular understanding of 'paraphernalia'

as drug-related items . . . , a regulation of 'paraphernalia' alone would not provide much warning of the nature of the items regulated." *Id.*

The Court further determined that the phrase "designed for use" was not unconstitutionally vague on its face since the Plaintiff in the action conceded that the phrase specifically referred to "structural characteristics of an item." *Id.*, 455 U.S. at 501, 102 S.Ct. at 1195.

Justice Marshall's majority opinion stated "[a] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, *not the intent of the retailer* or customer." *Hoffman Estates*, 455 U.S. at 501, 102 S.Ct. at 1195. (emphasis added). What the District Court and the Eighth Circuit have done in this case is to transfer the manufacturer's intent in design to the Petitioners' intent in marketing, and removed the requirement that the government prove scienter on the part of the retailer.

While the *Hoffman* Court illustrated how an objective scienter could be applied against a designer/manufacturer whose own intent was made clear by the physical characteristics of an item, the Court asserted that the balance of the definition in the *Hoffman* ordinance called for a subjective review of the retailer's intent under the term "marketed for use." "The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.*, 455 U.S. at 502, 102 S.Ct. at 1195.

d. Legislative History of Section 857 Provides Little Guidance As to the Required Intent

In 1986, Congress passed the Act at issue in this case, a close adaption of the DEA's Model Act. *Congressional Record*, S13758 (September 26, 1986). Section 857 is based upon the Drug Enforcement Agency's Model Act as propounded by the Department of Justice in 1979. See *United States v. Main Street Distributing, Inc.*, 700 F.Supp. 655 (E.D.N.Y. 1988). Since that time, numerous state and local governments enacted statutes outlawing the sale of drug paraphernalia. A key difference between the federal law and the Model Act was the elimination of the language specifically requiring proof of a defendant's subjective intent for a conviction under the act.

The *Schneiderman* court, and the other courts finding a subjective scienter requirement in the federal law recognized the change from the Model Act. Those Courts looked to the definition elements, and specifically the fourteen factors, as creating the required element of subjective scienter.

The Eighth Circuit in this case, however, held that the "designed for use" approach created an "objective scienter." The Court stated that certain objects, such as "bongs", were designed exclusively or primarily for use with illegal drugs and thus possession establishes the requisite intent to violate the law.

An "objective" scienter, however, creates a strict liability offense with no finding that a defendant intended to violate the law. Failure to include an intent provision prevents a retailer from having fair notice of what is and

is not illegal, a condition often cured by inclusion of a *mens rea* provision.

The court in *Schneiderman* overturned the District Court and interpreted the statute to contain a subjective scienter requirement. The court found support for this reading of the act from the legislative history:

> Fortunately, the legislative history of § 857 offers some guidance. During hearings on the bill that became § 857, Representative McCullum questioned Representative Levine, the sponsor of the bill, about the intent language. After recognizing that the phrase "designed for use" was clearly very narrow, Representative McCullum asked for clarification of "primarily intended for the use." Acknowledging that scienter was necessary, Representative Levine stated that the government would be "required to prove intent on the part of the defendant in a particular trial" to obtain a conviction under the "primarily intended" standard.

Schneiderman, 958 F.2d at 1567. (citations omitted).

The Eighth Circuit below, however, criticized the use of the limited legislative history to find an intent to include a subjective scienter element in the act. *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 657 (8th Cir. 1992), footnote 3.

The legislative history does indicate that "[i]t would be the intent on the part of the defendant in a particular trial" that was relevant. *United States v. Main Street Distributing, Inc.*, 700 F.Supp. 655, 664 (E.D.N.Y. 1988) (quoting *Mail Order Drug Paraphernalia Control Act: Hearings on H.R. 1625 Before the Subcommittee on Crime of House Committee of the Judiciary*, 99th Cong. 2nd Sess. 19-21 (1986)).

The use of a *manufacturer's* intent in designing a product, or a *customer's* intent in purchasing a product was not intended to impose liability on a retailer absent proof of their subjective intent. It is that transferred intent, from a product's design, however, which was applied in *Posters 'N' Things*, 969 F.2d at 660.

II. THE PETITIONERS' CONVICTIONS MUST BE REVERSED BECAUSE THE ACT AS APPLIED WAS UNCONSTITUTIONALLY VAGUE

a. As Applied, Petitioners' Convictions Under Section 857 Must Be Reversed

The problem with an "objective scienter" is well-illustrated in this case. By determining that certain substances were *per se* drug paraphernalia, the jury was required to find the defendants guilty pursuant to § 857 for items "primarily intended or designed for use" with controlled substances regardless of their intent. Counts 1, 2, 3, 4, 5, 7, 8 and 9 all rely solely or in part on Section 857. Neither the district court nor the Eighth Circuit defined the term "primarily intended."

To be constitutional in its application, the term "intended for use" must allow the finder of fact to determine that the accused has intended or, in this case under § 857, that the defendant primarily intended the items which they sold to be used with controlled substances. In this case, however the district court rejected the clear majority of opinions and specifically informed the finder of fact, under Jury Instructions No. 37 and 39, that the

items listed in the law were drug paraphernalia and the intent of the accused retailer was irrelevant.

Under this objective standard applied by the courts below, it was the Court, rather than the jury, which determined that the substances mannitol, mannite, and inositol were paraphernalia.

These instructions advised the jury to view alleged drug paraphernalia objectively, to find that the items were illegal, and to disregard any intent on the part of the Petitioners. Inserting the court's standard for mannitol, mannite, and inositol in the Drug Paraphernalia Act into a statute which requires intent provides no notice to retailers as to what substances or items will or will not be considered illegal. The Act is therefore unconstitutional as applied in this case.

b. An Objective Scienter Also was Applied with Petitioner's Conviction Under 21 U.S.C. § 841(a)(1)

The objective scienter requirement applied against the Petitioners further manifests itself in the accusation of aiding and abetting in the violation of 21 U.S.C. § 841(a)(1) (manufacture and distribution of cocaine). The government's witnesses testified that mannitol, mannite, and inositol were "objectively" drug paraphernalia and thereby in violation of 21 U.S.C. § 857. Under 21 U.S.C. § 857, the mannitol, mannite, and inositol, were "objectively" viewed in light of the definition of drug paraphernalia which includes items for use in manufacturing, compounding, processing, or preparing a controlled substance. By its own definition, the mannitol, mannite, and

inositol defined and "objectively" charged to the jury, under § 857, required the jury to find that the substances were intended for manufacturing with a controlled substance. The jury was forced to find that the Petitioners aided and abetted in the manufacture of cocaine under 21 U.S.C. § 841(a)(1).

In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court restated the clear constitutional dictate that a jury charge may not create "a presumption that relieves the State of its burden of persuasion on an element of an offense." *Id.*, 471 U.S. at 315, 105 S.Ct. at 1971. See also *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

By using an objective standard, and thus creating **per se** paraphernalia, the District Court shifted the burden of proof onto the retailers, forcing them to attempt to prove that affected items are not intended for use in connection with controlled substances. Such a standard is a clear violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. *Francis v. Franklin*, 471 U.S. at 315, 105 S.Ct. at 2450, 61 L.Ed.2d 39 (1979).

c. Petitioner's Conviction for Money Laundering Must Also be Reversed

The remaining count of Petitioner Acty's conviction was for money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). To convict Acty of money laundering, the government is first required to prove that she knowingly conducted a financial transaction that involved the proceeds of an unlawful activity. The unlawful activity

alleged in this count is the sale of illegal drug paraphernalia. For the reasons previously stated, those counts must be reversed, and therefore, Count six (6) alleging money laundering must also be reversed.

CONCLUSION

Petitioners, Lana Christine Acty, and Posters 'N' Things were denied their Fifth and Fourteenth Amendment rights to a fair trial when the District Court applied an objective scienter standard. Because of this error, as reflected in the jury instructions, this court should reverse each and every count of Petitioners' conviction. In addition, this court should hold that the Mail Order Drug Paraphernalia Act, 21 U.S.C. § 857, requires proof of subjective scienter as an element for conviction, or in the alternative, that the failure to require this element renders the statute unconstitutional.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1922

POSTERS 'N' THINGS, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the offense of making use of an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 21 U.S.C. 857 (1988), contains a *mens rea* element.

2. Whether 21 U.S.C. 857 (1988) is unconstitutionally vague as applied to petitioners.

3. Whether petitioner Acty was properly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 969 F.2d 652.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. On August 17, 1992, the court of appeals denied a petition for rehearing. Pet. App. A50. The petition for a writ of certiorari was filed on November 16, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 857 and 841(a)(1) of Title 21, United States Code (1988), Section 2 of Title 18, and the Model Drug Paraphernalia Act are reprinted at App., *infra*, 1a-11a.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioners were convicted of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. 857(a)(1) (1988) (Counts 1 and 2) and conspiring to commit that offense, in violation of 18 U.S.C. 371 (Count 3). Petitioner Acty was also convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 4); investing income derived from a drug offense, in violation of 21 U.S.C. 854 (Count 5); money laundering, in violation of 18 U.S.C. 1956(a)(1) (Count 6); two counts of engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. 1957 (Counts 7 and 8); and one count of conspiring to use an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 18 U.S.C. 371 (Count 9). Acty was sentenced to imprisonment for 108 months, to be followed by a five-year term of supervised release, and was fined $150,000. Posters 'N' Things was fined $75,000. The court of appeals affirmed. Pet. App. A1-A49.

1. Acty formed Posters 'N' Things, Ltd., in 1977. Posters 'N' Things operated several businesses, including a store named "Forbidden Fruit," which was later renamed "World Wide Imports." Law enforcement officers received complaints that the store was selling drug paraphernalia. In addition, officers investigating drug cases found drug diluents (chemicals used to "cut" or dilute illegal drugs) and other drug paraphernalia that had been purchased from Forbidden Fruit. Pet. App. A3-A4; Tr. 658-659.

In March 1990, law enforcement officers executed warrants to search petitioners' business premises and Acty's residence. The officers seized various items, including pipes, bongs, roach clips, scales, and drug diluents including mannitol and inositol. The officers also seized cash, business records, a newspaper article entitled "Drug paraphernalia seized," a copy of 21 U.S.C. 857 (1988), and catalogs and advertisements describing products sold by petitioners. Pet. App. A4-A5; GX 92C. The advertisements offered "Coke Kits" and "Free Base Kits" for sale. GX 85, J.A. 36. In addition, petitioners advertised a product called "PseudoCaine" as "The Hottest Active Cut In The Nation! Its the new cut product everybody who bought Mannitol is now begging for! * * * 'Burns' just like the real thing." Pet. App. A39-A40; GX 164, J.A. 45.

William Hopkins, a retired police officer, testified for the government as an expert on drug paraphernalia. He testified that many of the items seized from petitioners are used exclusively or primarily with illegal drugs. For example, metal pipes with screens are used almost exclusively to smoke hashish. Tr. 452-454, 456. In addition, Hopkins testified that certain features of the wooden pipes sold by petitioners revealed that they were designed for use with marijuana. The bowls or burning chambers of the pipes are much smaller than the bowls of tobacco pipes. In addition, the stems of marijuana pipes differ from the stems of tobacco pipes. Tr. 432, 450-451. Hopkins explained that water pipes or bongs remove the harsh "bite" from marijuana smoke by filtering it through water. Such filtration is unnecessary for tobacco smoke, because the bite is removed when

tobacco is fermented, aged, and cured. Water pipes, he explained, would actually remove the flavor from tobacco. Tr. 433. Hopkins stated that an electric pipe seized from petitioners is designed to pump additional marijuana smoke into the smoker's lungs in order to increase the effect of the drug. Tr. 459. In addition, Hopkins explained that an item known as an "executive or cocaine kit" contained a miniature scale to weigh cocaine, a cocaine spoon, a grinder to grind "rock" cocaine, and a funnel that screws on to the top of a cocaine vial. Tr. 461-464.[1]

Among petitioners' regular customers were four convicted drug dealers who had purchased drug diluents in amounts that drug dealers rather than users would purchase. Pet. App. A40. One of the dealers, Randy Kennedy, testified that Forbidden Fruit was a one-stop shop from which he bought drug diluents, scales for weighing cocaine, "crack" pipes, and plastic baggies to package cocaine for sale. Tr. 1550-1553, 1588. From March 1989 to January 1990, Kennedy made numerous trips to the store and purchased between $2,000 and $4,000 worth of merchandise. Tr. 1552. Another dealer, Thomas Searles, began making purchases at Forbidden Fruit when he was 13 or 14 years old. He went to the store three or four times a week and spent $5,000 there during a five-month period. Tr. 721, 735.

[1] Additional information about drug paraphernalia is contained in United States International Trade Commission, *Importation of Certain Drug Paraphernalia into the United States: Report to the Committee on Finance, United States Senate, on Investigation No. 332-277 Under Section 332 of the Tariff Act of 1930*, at 16-23 (USITC Pub. No. 2223, Sept. 1989); and Paul Dennis & Carolyn Barry, *The Marijuana Catalogue* 107-147 (1978).

Acty's employees knew they were selling drug paraphernalia. Tr. 528, 581, 593. Acty posted a list of words that her employees were directed to avoid using because the words revealed that the employees knew the items being sold were drug paraphernalia. GXs 87A, 87B, 87C. When customers referred to "getting high" or needing a "pot pipe," the employees were instructed to refer to tobacco and tell the customers to "use [the items] for what you want; we don't want to know." Tr. 523, 527, 559, 580. Acty's husband and business partner, co-defendant George Moore, boasted to a prospective employee that his income came from "the largest retail outlet of drug paraphernalia in Iowa." Tr. 618.[2]

2. The district court instructed the jury that in order to convict petitioners of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of 21 U.S.C. 857 (1988), the jury was required to find, among other things, that "the items in question constitute drug paraphernalia," that "the defendant whose case you are considering knew the nature and character of the items," and that "the defendant whose case you are considering made use of the interstate conveyance knowingly as part of a scheme to sell drug paraphernalia." J.A. 21.

3. The court of appeals affirmed petitioners' convictions. Pet. App. A1-A49. The court first rejected petitioners' contention that Section 857 is unconstitutional because it lacks a scienter requirement. Pet. App. A12-A26. While acknowledging that the statute

[2] Moore was convicted at trial, but he failed to appear for sentencing. Pet. App. A5 n.1.

does not expressly require proof of scienter, *id.* at A18, the court noted that "[t]he omission of subjective scienter language from a statute does not preclude a court from reading such a knowledge requirement into the statute," *id.* at A16, citing *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). The court reasoned that the statutory definition of drug paraphernalia as including "any equipment, product, or material * * * which is primarily * * * designed for use" with a controlled substance establishes that the offense contains what the court termed an "objective scienter" requirement. Pet. App. A19-A20. The court concluded that Section 857(d) "lists items which Congress evidently determined are intended or designed for illegal purposes by their very nature and irrespective of a defendant's subjective intent." Pet. App. A22, quoting *United States* v. *Dyer*, 750 F. Supp. 1278, 1284 (E.D. Va. 1990). In addition, the court noted that the factors listed in Section 857(e) as relevant to determining whether an item is "drug paraphernalia" were "objective in nature." Pet. App. A22.

The "objective scienter" requirement of Section 857 satisfies due process, the court held. Pet. App. A23-A26. According to the court, the inherent characteristics of an item that is "primarily intended or designed for use" with illegal drugs provide defendants with adequate notice of what conduct the statute makes unlawful.

The court of appeals also held that Section 857 was not unconstitutionally vague. Pet. App. A26-A33. The court explained that a statute is not facially void for vagueness unless it "is impermissibly vague in all of its application[s]." *Id.* at A29, quoting *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). The court explained that Section 857 defined a "clear core of prohibited conduct" and that it was not unconstitutionally vague as applied to petitioners. Pet. App. A30-A31. In challenging the constitutionality of the statute as applied, petitioners' "only point" was that "law enforcement officers who executed the search warrants were able to 'totally ignore' the factors listed in subsection (e) for determining what constitutes drug paraphernalia." *Id.* at A31-A32. The court of appeals rejected the contention "that the factors in subsection (e) were ignored." *Id.* at A32. On the contrary, the court found, the government repeatedly referred to" the statutory factors "to establish that the items being sold were illegal." *Id.* at A32-A33.

Finally, the court of appeals held that the evidence was sufficient to support Acty's conviction for aiding and abetting the manufacture and sale of cocaine. Pet. App. A37-A40. The court found that the evidence showed that Acty had sold cocaine diluents to at least four cocaine dealers, including Randy Kennedy, whom she was charged with aiding and abetting. The government showed that several of the diluents Acty sold had few or no lawful uses, and one was advertised by Acty as designed and intended for use as a cocaine diluent. The evidence further showed that Acty sold the diluents in amounts that drug dealers would use. *Id.* at A39-A40.[3]

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[3] The court also rejected Acty's claim that the evidence was insufficient to support her conviction for money laundering. Pet. App. A34-A37. Although the court of appeals agreed with the government that the district court had erred by sentencing Acty to less than the mandatory ten-year term of

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The court of appeals held that Section 857 contains an "objective scienter" requirement under which "a violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object." Pet. App. A15. Although other courts of appeals have agreed that Section 857 (or its successor, 21 U.S.C. 863) contains a *mens rea* requirement, they have not agreed on the formulation of that requirement. The Sixth Circuit has held that Section 857 "requires an intent to distribute the items for drug use," and that this requirement is satisfied if the defendant had "knowledge that there is a strong probability that the items will be used in this way." *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (1989). The Second Circuit has held that the government satisfies the scienter element by showing either (1) that "the defendant knew there was a strong probability the items would be * * * used" in connection with illegal drugs, or (2) that "the objective features of an item establish *per se* that it is 'designed for use' with illegal drugs." *United States* v. *Schneiderman*, 968 F.2d 1564, 1567 (1992), cert. denied, 113 S. Ct. 1283 (1993). In *United States* v. *Murphy*, 977 F.2d 503, 505-506 (1992), the

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imprisonment for aiding and abetting the manufacture and distribution of more than 100 kilograms of cocaine, the court declined to require resentencing because the government had failed to make a timely objection to the illegal sentence. *Id.* at A40-A45. The court also upheld the district court's downward departure from the Sentencing Guidelines sentencing range. *Id.* at A45-A49.

Tenth Circuit held that "the 'primarily intended' language in § 857(d) constitutes the requisite scienter element of the offense charged." And in *United States* v. *Mishra*, 979 F.2d 301, 307-308 (1992), the Third Circuit held that the scienter element is satisfied by showing either (1) that "the defendant seller contemplated, or reasonably expected under the circumstances, that the item sold or offered for sale would be used with illegal drugs" or (2) that the item is "primarily * * * designed" for use with illegal drugs and "the defendant seller was aware of the general nature of the item."

Although we agree with the courts of appeals that it is appropriate to construe 21 U.S.C. 857 to contain a *mens rea* requirement, our approach differs somewhat from that taken by any of the courts of appeals that have considered the issue, including the court of appeals in this case. In our view, in order to convict a defendant of violating 21 U.S.C. 857, the government must prove that the defendant knew the items at issue are used primarily with illegal drugs. Because the district court's instructions required the jury to find such knowledge in order to convict petitioners, the judgment in this case should be affirmed.

a. Section 857(a)(1) contains no express *mens rea* requirement. It simply provides that "[i]t is unlawful for any person * * * to make use of [an] interstate conveyance as part of a scheme to sell drug paraphernalia." Section 857(d) defines "drug paraphernalia" as any item "which is primarily intended or designed for use" with illegal drugs. Consequently, an item is "drug paraphernalia" within the meaning of Section 857 if it is manufactured for use with illegal drugs or if, regardless of its original design, it is intended to be used for that purpose.

b. Although Section 857 does not contain an express *mens rea* requirement, the Court has held that the failure of Congress to set forth an explicit mental element for a criminal offense does not warrant a departure from the general assumption that criminal offenses require proof of *mens rea*. The legislative history of Section 857 does not warrant a departure from that presumption. Section 857 borrows much of its language from the Model Drug Paraphernalia Act. The Model Act expressly provides that it is "unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used" with controlled substances. Art. I, § B, App., *infra*, 8a-9a. Although Congress omitted that language from Section 857, that omission does not demonstrate a clear intent to create a strict liability offense, particularly in light of the statement of the sponsor of Section 857 that the "primarily intended for use" standard was meant to require a showing of intent on the part of the defendant with respect to the prospective use of the items in question.

c. The appropriate *mens rea* standard for Section 857 is that the defendant must be shown to have acted with knowledge that the items at issue are used primarily in connection with controlled substances. This Court has recognized that "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." *United States* v. *Bailey*, 444 U.S. 394, 408 (1980). Moreover, consistent with general principles of criminal liability, the government was not required to prove that petitioners knew the items at issue satisfied the legal definition of "drug paraphernalia" in

Section 857; it was sufficient for the government to prove that petitioners knew "the character and nature of the materials." *Hamling* v. *United States*, 418 U.S. 87, 123 (1974).

d. In describing the state of mind requirement of Section 857 as applied to the defendants in this case, the district court instructed the jury that the defendants had to know "the nature, character, and use of the items being sold or offered for sale at the store." J.A. 18, 20. The court further instructed that the government had to prove that each defendant made use of an interstate conveyance as "part of a scheme to sell drug paraphernalia," and that each defendant used the interstate conveyance "knowingly as part of that scheme." J.A. 21-22. Those instructions were sufficient to inform the jurors that they could not convict petitioners unless they found, beyond a reasonable doubt, that petitioners knew the nature and use of the items at issue—*i.e.*, that they knew the items were used in connection with illegal drugs.

e. Section 857 is not unconstitutionally vague as applied to petitioners. Congress "define[d] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). First, the statute contains a list of examples of drug paraphernalia that provides defendants and law enforcement officers with guideposts to prohibited conduct. Second, the statutory factors for determining whether an item is drug paraphernalia provide objective criteria for measuring possible violations of the law and min-

imize the likelihood of arbitrary enforcement. Third, the statutory exception for tobacco-related products further limits the scope of the statute and protects those who sell legitimate products from discriminatory enforcement. Finally, the *mens rea* requirement helps overcome any vagueness problem. Although borderline cases may arise under the statute, this is not such a case. Petitioners operated a business devoted substantially to the sale of "hard core" drug paraphernalia, including items specifically listed in Section 857(d). Accordingly, the statute is not unconstitutionally vague as applied to petitioners.

2. Petitioner Acty was properly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). The district court instructed the jury that, in order to convict Acty on the aiding and abetting count, it had to find that Acty (1) knew that her customer Randy Kennedy was manufacturing and distributing cocaine, and (2) acted knowingly and for the purpose of aiding Randy Kennedy in the commission of that offense.

The evidence at trial was sufficient to support Acty's conviction on the aiding and abetting count. The evidence showed that Randy Kennedy made numerous trips to Acty's store over a ten-month period to purchase drug diluents and other paraphernalia. In all, Kennedy spent between $2,000 and $4,000 at the store. Kennedy testified that there was "no question" that the personnel at the store knew that he was using his purchases to cut, package, and distribute cocaine. Tr. 1573.

ARGUMENT

I. TO CONVICT A DEFENDANT UNDER 21 U.S.C. 857, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT KNEW THE ITEMS AT ISSUE ARE USED PRIMARILY WITH ILLEGAL DRUGS

Petitioners contend (Br. 5-15) that 21 U.S.C. 857 (1988) must be construed to contain a *mens rea* requirement in order to be constitutional. In our view, Section 857 should be construed to require the government to prove that the defendant knew that the items at issue are used primarily with illegal drugs. Because we agree with petitioners that it is appropriate to require proof of *mens rea* under Section 857, there is no occasion for the Court to consider whether Section 857 would be constitutional if it defined a strict liability offense.[4]

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[4] If Section 857 lacked any *mens rea* requirement, it would not necessarily follow that the statute is unconstitutional. "[C]riminal law has broadened its scope to include * * * breaches of 'regulatory measures in the exercise of * * * the police power.'" *United States* v. *Mishra*, 979 F.2d 301, 305-306 (3d Cir. 1992), quoting *United States* v. *Balint*, 258 U.S. 250, 252 (1922). See also *United States* v. *Freed*, 401 U.S. 601, 607-610 (1971); *United States* v. *Dotterweich*, 320 U.S. 277, 284-285 (1943). Accordingly, courts have rejected constitutional challenges to criminal statutes that do not require proof of *mens rea* if they have "a moderate penalty scheme similar to that contemplated by" Section 857. *Mishra*, 979 F.2d at 306.

We recognize, however, that Section 857 applies to "dual-use" items (items that have both legitimate and illegitimate uses) as well as to hard core drug paraphernalia that has no legitimate use. The dual-use items raise more serious constitutional concerns. See *United States* v. *International Minerals Corp.*, 402 U.S. 558, 564-565 (1971) ("In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades,

A. Section 857 Contains No Express *Mens Rea* Requirement

"In determining the scope of a statute, we look first to its language." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Former Section 857 provides:

> It is unlawful for any person—
>
> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
>
> (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
>
> (3) to import or export drug paraphernalia.

21 U.S.C. 857(a) (1988).[5] Although Congress's use of the word "scheme" implies the existence of some type of a plan or program, Section 857(a) does not expressly require proof of *mens rea*.

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in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require * * * '*mens rea*' as to each ingredient of the offense.").

[5] In 1990, Congress repealed Section 857 and replaced it with 21 U.S.C. 863 (Supp. II 1990). See Crime Control Act of 1990, Pub. L. No. 101-647, § 2401, 104 Stat. 4858. Section 863 is in large part a reenactment of Section 857. But Section 863 broadened the scope of the Act by eliminating the requirement of a "scheme" in Section 857(a)(1) and by replacing Section 857(a)(2) with a provision making it unlawful "to sell or offer for sale drug paraphernalia." 21 U.S.C. 863(a)(1) and (2) (Supp. II 1990). See *United States* v. *Mishra*, 979 F.2d at 304 & nn.3-5.

Some courts have found a *mens rea* requirement for Section 857 in the definitional provision, Section 857(d), but we believe that provision establishes objective standards for determining what constitutes drug paraphernalia, not a subjective *mens rea* standard. Section 857(d) defines "drug paraphernalia" as "any equipment, product, or material of any kind which is primarily intended or designed for use" with controlled substances.[6] 21 U.S.C. 857(d) (1988). The critical language of the definitional provision is the two-part test that makes an item drug paraphernalia if it was either "primarily designed" for use with controlled substances or "primarily intended" for such use. In *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500 (1982), this Court construed an ordinance that required retailers to obtain a license to sell any items "designed or marketed for use with illegal cannabis or drugs." The Court concluded that the ordinance established two standards: a "'designed * * * for use' standard" and an "alternative 'marketed for use' standard." 455 U.S. at 500, 502. Similarly, the language of Section 857 defines two categories of drug paraphernalia: (1) items that are "primarily intended * * * for use" with illegal drugs and (2)

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[6] Section 857(d) lists 15 examples of items that are primarily intended or designed for use with illegal drugs. 21 U.S.C. 857(d)(1)-(15), App., *infra*, 2a-3a. Section 857(e) lists eight factors that may be considered "[i]n determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors." App., *infra*, 3a. Section 857(f) exempts from coverage any person authorized by law to manufacture, possess, or distribute an item, and "any item * * * traditionally intended for use with tobacco products." App., *infra*, 3a-4a.

items that are "primarily * * * designed for use" with illegal drugs.

In discussing the "designed for use" standard in *Hoffman Estates*, the Court noted that "[a] principal meaning of 'design' is '[t]o fashion according to a plan.'" 455 U.S. at 501, quoting *Webster's New International Dictonary of the English Language* 707 (2d ed. 1957). See also *Webster's Third New International Dictionary* 612 (1986) ("designed" means "done, performed, or made with purpose and intent"); *Random House Dictionary of the English Language* 539 (2d ed. 1987) ("designed" means "made or done intentionally; intended; planned"). In *Hoffman Estates*, the Court concluded that

> [i]t is therefore plain that the ["designed for use"] standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer.

455 U.S. at 501. The Court's conclusion in *Hoffman Estates* applies with equal force to the "primarily designed for use" standard of Section 857. An item is drug paraphernalia under the "designed for use" standard if it is principally used with illegal drugs by virtue of objective features designed by the manufacturer. Accordingly, if the item meets the "designed for use" standard, it is drug paraphernalia without regard to the knowledge or intent of a defendant who sells or transports the item. See *United States* v. *Mishra*, 979 F.2d 301, 308 (3d Cir. 1992);

United States v. *Schneiderman*, 968 F.2d 1564, 1567 (2d Cir. 1992), cert. denied, 113 S. Ct. 1283 (1993).[7]

Section 857 also provides that items "primarily intended * * * for use" with illegal drugs are drug paraphernalia. The statute does not state expressly whether the "primarily intended for use" standard refers to the intent of the defendant or to the intent of non-defendants, including distributors, retailers, and buyers. In our view, the phrase "primarily intended for use" refers not to the state of mind of the defendant, but to the use to which the item is likely to be put. That objective construction of "primarily intended for use" makes that phrase parallel the meaning of the accompanying phrase "primarily designed for use." In addition, the objective construction of "intended for use" is supported by the list of relevant factors in Section 857(e). The factors focus on the actual use of the item in the community, as revealed by instructions, advertising, and expert testimony. Although each of the factors listed in Section 857(e) would have some probative value in determining a defendant's subjective intent, it is significant that Congress omitted a factor that would have borne much more directly on the question of

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[7] An example of an item that meets the "designed for use" standard is a bong. As the principal author of the Model Drug Paraphernalia Act has explained, a bong "is drug paraphernalia without regard to who is holding it, or what my intent is; this is drug paraphernalia strictly because of its *design*." *Mail Order Drug Paraphernalia Control Act: Hearings on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 66 (1986).

subjective intent—the defendant's own statements about his intent. That omission is particularly striking when Section 857 is compared to the Model Drug Paraphernalia Act. The Model Act includes among the relevant factors "[s]tatements by an owner * * * concerning [the] use" of the object and "[d]irect or circumstantial evidence of the intent of an owner * * * to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act."[8] App., *infra*, 6a-7a. Congress's omission of both factors in Section 857 indicates that it did not intend to define drug paraphernalia in terms of the subjective intent of the defendant.

Our construction of the "intended for use" standard is also supported by Congress's use of similar language in Section 857(f), which provides an exemption for items "traditionally intended for use with tobacco products." App., *infra*, 4a. The "traditional" use of an item plainly does not depend on the subjective intent of a particular defendant. As originally enacted, moreover, the Section 857(f) exemption applied to items "primarily intended for use with" tobacco products. See Pub. L. No. 99-570, Tit. I, § 1822, 100 Stat. 3207. In 1988, Congress replaced "primarily" with "traditionally" in order to "clarif[y]" the meaning of the exemption. See Pub. L. No. 100-690, Tit. IV, § 6485, 102 Stat. 4384. If Congress had meant to shift from a subjective to an objective concept of intent, it is unlikely that it would have characterized the amendment as merely "clarifying" the law. Presumably Congress enacted the clarifying amendment because an item that is primarly intended for use with illegal drugs cannot be primarily intended for use with tobacco. The amendment makes clear that the exemption applies to items associated with tobacco as a matter of historical tradition, even if their primary present-day use is with illegal drugs.

Finally, our objective construction of the "primarily intended for use" language avoids the creation of an unusual *mens rea* standard and is consistent with the meaning of similar language in other federal criminal statutes. See 18 U.S.C. 921(a)(17)(B) ("armor piercing ammunition" excludes any projectile that the Secretary of the Treasury finds is "primarily intended" to be used for sporting purposes); 21 U.S.C. 860(d)(2) ("youth center" means a recreational facility "intended primarily for use by persons under 18 years of age").[9]

On either the objective or the subjective view, the "primarily intended for use" standard includes

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[8] Although the Model Act includes the owner's statements and other evidence of the owner's intent among the relevant factors, it expressly provides that "the innocence of an owner * * * as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia." App., *infra*, 7a.

[9] Consistent with this view, the district court instructed the jury that the term "primarily intended" was not limited to the intent of the defendant or "any particular person or persons." J.A. 31. We acknowledge, however, that several courts of appeals have construed the term "primarily intended for use" to refer to the defendants intent, *see, e.g., Michra*, 979 F.2d at 307 n.10; *Schneiderman*, 968 F.2d at 1567; *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir. 1989), and a statement by the principal sponsor of the Act in the House, see pp. 24-25, *infra*, lends some support to that construction.

"dual-purpose items" such as scales and razor blades that may be used for legitimate purposes as well as with illegal drugs. If those items are intended to be used primarily with controlled substances, they are drug paraphernalia without regard to the manufacturer's design.

B. It Is Appropriate To Infer A *Mens Rea* Requirement In Section 857

Although Section 857 does not contain an express *mens rea* requirement and defines "drug paraphernalia" without regard to the subjective intent of the defendant, it does not follow that Section 857 defines a strict liability offense. The Court has recognized that "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand.'" *United States* v. *Bailey*, 444 U.S. 394, 402 (1980), quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). In *Morissette*, the Court, speaking through Justice Jackson, stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

342 U.S. at 250. Accordingly, criminal offenses that require no *mens rea* "have a 'generally disfavored status.'" *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978). "[T]he failure of Congress explicitly and unambiguously to

indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law." *Liparota*, 471 U.S. at 426. Instead, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States Gypsum Co.*, 438 U.S. at 438.

Despite this presumption, "courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense." *United States* v. *Bailey*, 444 U.S. 394, 406 (1980). In this instance, however, we do not believe that the language or legislative history of Section 857 demonstrates that Congress intended to dispense with a *mens rea* requirement.

As we have noted, Section 857(a)(1) makes it unlawful to use an interstate conveyance as part of "a scheme to sell drug paraphernalia." The use of the word "scheme" strongly suggests that Congress intended to require proof of *mens rea*. Although the word "scheme" was omitted from the statute when it was amended in 1990, that omission was designed to broaden the statute to reach additional conduct, but not to affect the statute's *mens rea* requirement. See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. I, at 108 (1990) (amendment eliminates requirement of a "scheme" and expands the scope of the Act to intrastate as well as interstate conduct).

Section 857 was first enacted as part of the Anti-Drug Abuse Act of 1986. See Pub. L. No. 99-570, Tit. I, § 1822, 100 Stat. 3207-51. No committee reports accompanied the legislation that became Section 857. The chief sponsor of the legislation in the House stated that the purpose of Section 857 was to

eliminate interstate commerce in drug paraphernalia. See *Mail Order Drug Paraphernalia Control Act: Hearing on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary (Hearing)*, 99th Cong., 2d Sess. 15 (1986) (remarks of Rep. Levine). Congress regarded that commerce as a public menace. As Representative Levine explained, the commerce in drug paraphernalia "glamorizes the drug culture," "encourages drug experimentation," and "serves to counter parental guidance as well as educational and community programs to prevent drug abuse." *Id.* at 18. See also 132 Cong. Rec. 31,420 (1986) (remarks of Sen. Wilson); *id.* at 26,451 (remarks of Sen. Wilson); *id.* at 22,920-22,921 (remarks of Rep. Levine); *Hearing* at 74-76 (remarks of Rep. Gilman); *id.* at 194-199 (remarks of Rep. Rangel).

The predecessor of Section 857 was the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration. See *Hearing* at 15 (statement of Rep. Levine) (Section 857 was "drafted closely after the Model Drug Paraphernalia Act" and "deliberately incorporates much of the same language that is contained in that act").[10] The Model Act, which has been adopted in some form by most States, defines "drug paraphernalia" as items "used, intended for use, or designed for use" with controlled substances. Art. I, App., *infra*, 4a. The commentary to the Model Act states that this language requires "a specific intent to violate, or to facilitate a violation of, the drug laws." Hearing at 187. Unlike Section 857, the Model Act expressly provides that it is "unlawful for any person to deliver, possess

[10] The Model Act is reprinted in the appendix to this brief.

with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, *knowing, or under circumstances where one reasonably should know*, that it will be used" in connection with controlled substances. Art. II, App., *infra*, 8a (emphasis added).

In enacting Section 857, Congress omitted the express *mens rea* provision in Article II of the Model Act and modified the definition of drug paraphernalia to apply to items "*primarily* intended or designed for use" with illegal drugs. Although those changes may suggest that Congress intended to eliminate a knowledge requirement and move in the direction of a strict liability offense, it is also possible that Congress omitted the *mens rea* language of the Model Act in order to delete from the federal statute the relaxed negligence standard ("under circumstances where one reasonably should know") that the Model Act contained.[11] See *infra* note 13 (discussing distinction between negligence and recklessness under the Model Penal Code). In any event, the change in language is not a sufficiently clear indicator of Congress's intent to overcome the strong presumption that Congress intends to include a *mens rea* requirement in criminal statutes.

During the House hearings on the legislation that became Section 857, Representative Levine, the prin-

[11] That hypothesis is supported by Congress's omission from Section 857 of other language from the Model Act referring to the "should reasonably know" standard of liability. See Model Act Art. I, App., *infra*, 7a (referring to evidence of a person's intent to deliver an item of alleged drug paraphernalia "to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act").

cipal sponsor of the legislation, engaged in the following colloquy with Representative McCollum:

> MR. MCCOLLUM: [I]t seems very clear the word "designed," would be very narrow. I don't have a real problem with that. If the cigarette papers were designed for the purpose of use in the drug manufacturing or the inhaling or the use [of] controlled substances or whatever, that is fairly clear. But what isn't clear is the fact that you have got another word in there "primarily intended for the use."
>
> Do you mean to say that intended, even though it was designed for multiple uses, that at the time, the seller, the particular seller of this drug paraphernalia sold it, that it was his intent in selling it that it be used for the purposes described? Is that the intent that the prosecutor would have to prove, the intent of the seller, or just what have you got in mind?
>
> MR. LEVINE: The purpose of the language in this section both in the model act, and in my legislation is to identify as clearly as possible the intent of the manufacturer and the seller to market a particular item as drug paraphernalia, subject to the interpretation of a trial court.
>
> MR. MCCOLLUM: An intent on the part of whom; on the part of the seller?
>
> MR. LEVINE: Well, it would depend on who is being prosecuted, if it was the seller, it would be the intent on the part of the seller. It would be the defendant. It would be the intent on the part of the defendant in a particular trial.
>
> My principal concerns in this area have always been with regard to sellers and manufacturers, but it would be the application with regard to whomever the defendant would be under the provisions of this act.

Hearing at 47-48; see also *id.* at 64 (statement of Rep. McCollum) ("the intent language in this statute, apparently by the will of the authors, would apply to the seller primarily, or whoever the person is that is being accused"). To be sure, the colloquy between Representative Levine and Representative McCollum was directed solely to the "primarily intended for use" standard; it did not address the alternative "primarily designed for use" standard. Although the colloquy therefore does not speak comprehensively to the *mens rea* question, it provides some indication that the legislation was not intended to create a strict liability offense.

C. In Order To Convict A Defendant Under Section 857, The Government Must Prove That The Defendant Knew The Items At Issue Are Used Primarily With Illegal Drugs

The Court has recognized that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States* v. *Bailey*, 444 U.S. at 403. "At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.'" *Ibid.* But that distinction was "the source of a good deal of confusion." In recent years, the Court has looked to the analytical framework of the American Law Institute's Model Penal Code in construing the *mens rea* requirement of federal criminal statutes. 444 U.S. at 403-404. In determining what mental state is required in the absence of express direction from Congress, the Court has held that it is ordinarily enough if a defendant acts "knowingly," *i.e.*, that he is aware of the nature of his conduct or is aware that his conduct is practically certain to

cause a particular result. Model Penal Code § 2.02 (2)(b). The Court has not ordinarily inferred a requirement that the defendant act "purposely," *i.e.*, with the conscious object to engage in particular conduct or bring about a particular result. *Id.* § 2.02 (2)(a)(i).[12]

In *Bailey*, the Court recognized that, "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." 444 U.S. at 408. In that case, absent any indication from Congress as to the *mens rea* required for conviction under the federal escape statute, 18 U.S.C. 751(a), the Court read into the statute a requirement that "an escapee knew his actions would result in his leaving physical confinement without permission." 444 U.S. at 408. The Court rejected a heightened *mens rea* requirement—that the escapee acted "with the intent to avoid confinement."

In *United States Gypsum Co.*, the Court was confronted with a similar question—whether, in the absence of an explicit *mens rea* requirement, a criminal violation of the Sherman Act "requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow." 438 U.S. at 444. The Court concluded that "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a suffi-

[12] The Model Penal Code concept of " 'purpose' corresponds loosely with the common-law concept of specific intent, while "knowledge' corresponds loosely with the concept of general intent." *Bailey*, 444 U.S. at 405.

cient predicate for a finding of criminal liability under the antitrust laws." *Ibid.* The Court reasoned that "[a] requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition * * * would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome." *Id.* at 446.[13]

The general rule requiring that the defendant act "knowingly" is appropriate for Section 857. To obtain a conviction under Section 857(a)(1), it should be sufficient for the government to prove that the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he

[13] The Model Penal Code also defines two additional culpability requirements: recklessness and negligence. A defendant acts "recklessly" with respect to an element of an offense if he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." Mode Penal Code § 2.02(c). A defendant acts "negligently" if "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(d). The Model Penal Code provides that when the standard of culpability is not established by statute, proof that the defendant acted recklessly is sufficient. *Id.* § 2.02(3). The commentary explains that "[t]his accepts as the basic norm what usually is regarded as the common law position." Section 2.02, comment 5, at 244. In *Bailey*, the Court did not decide whether recklessness was sufficient to warrant conviction under 18 U.S.C. 751(a), because the district court's instructions clearly required the jury to find that the defendants acted knowingly. 444 U.S. at 407, 409 n.7. As discussed below, see pp. 29-30, *infra*, we believe the jury instructions in this case required the jury to find that petitioners acted knowingly in order to convict them. Consequently, the Court need not consider whether recklessness is sufficient to warrant a conviction under Section 857.

knew were likely to be used with illegal drugs. See *Mishra*, 979 F.2d at 307, 308. As in *Bailey* and *United States Gypsum Co.*, the Court should decline to adopt a heightened standard of culpability. The purpose of a dealer in drug paraphernalia is to sell his wares. The seller may know that the items are very likely to be used with illegal drugs, but it is a matter of little consequence to the seller whether his buyers use a bong to smoke marijuana or as a flower vase. It would therefore be very difficult for the government to prove that the defendant's purpose was that the items be used with illegal drugs. If the Court were to impose a heightened culpability requirement, drug paraphernalia merchants could sell items used with illegal drugs as long as they took steps to establish that it was not their conscious object that the items be used with illegal drugs.

Finally, although the government is required to prove that the defendant knew the items at issue are used primarily in connection with illegal drugs, it is not required to prove that the defendant knew the items were drug paraphernalia within the meaning of the statute. The difference is illustrated by the Court's decision in *Hamling* v. *United States*, 418 U.S. 87 (1974). In *Hamling*, the Court held that 18 U.S.C. 1461, which prohibits the mailing of obscene materials, does not require the government to prove that the defendant knew the materials were obscene. The Court explained that "the word 'obscene,' as used in 18 U.S.C. 1461, is not merely a generic or descriptive term, but a legal term of art." 418 U.S. at 118. In holding that the government was not required to "prove a defendant's knowledge of the legal status of the materials he distributes," the Court relied on its prior decision in

Rosen v. *United States*, 161 U.S. 29 (1896). In *Rosen*, the Court reasoned that "[t]he evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene * * * was recognized as the test for determining whether the statute has been violated." 161 U.S. at 41-42. Accordingly, the Court held in *Hamling* that it was sufficient for the government to show that the defendant was aware of the "contents of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. at 123. The same reasoning, and the same conclusion, applies here.

D. The District Court's Instructions Required The Government To Prove That Petitioners Knew The Nature, Character, And Use Of The Items They Sold

Consistently with the construction of Section 857 that we propose, the district court instructed the jury that, in order to convict petitioners of violating the statute, it was required to find that petitioners knew the "nature, character, and use" of the items at issue.

In defining the elements of the crime, the district court required the jury to find that "the items in question constitute drug paraphernalia," that drug paraphernalia consisted of items primarily intended or designed for use with illegal drugs, and that the defendant "knew the nature and character of the items." J.A. 21-22, 29. The court elaborated on the knowledge requirement, describing it as " 'knowledge' of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store." J.A. 18. In connection with petitioners' defense of good faith, the court further instructed that the jury could consider evidence of the procedures

followed in petitioners' store to determine if those procedures were "inconsistent with the elements in the charges of the Indictment concerning the alleged knowledge of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store." J.A. 20. Through its instructions, the district court thus informed the jury that it could not convict petitioners unless it found that petitioners knew that the items at issue were used primarily with illegal drugs.

E. Section 857 Is Not Unconstitutionally Vague As Applied To Petitioners

Petitioners contend (Pet. Br. 15-18) that Section 857 is unconstitutionally vague as applied in this case. In particular, petitioners contend that they were not provided with constitutionally adequate notice that items such as mannitol and inositol are drug paraphernalia within the meaning of the Act.[14]

As an initial matter, petitioners did not raise that argument in the court of appeals. Before the court of appeals, petitioners' "only point" was that the statute was unconstitutionally vague as applied "because law enforcement officers who executed the search warrants were able to 'totally ignore' the factors listed in subsection (e) for determining what constitutes drug paraphernalia." Pet. App. A31-A32. The court of appeals rejected that argument on the ground that the government did not ignore the factors in subsection (e). The court of appeals concluded (Pet. App. A32-A33) that "[t]he law enforcement officers, and more importantly, the government at trial, repeatedly referred to or used the factors listed (e.g., [petitioners'] advertising material, expert testimony) to establish that items being sold were illegal."

[14] In *Hoffman Estates*, the Court rejected arguments that a similar drug paraphernalia law infringed First Amendment rights, 455 U.S. at 495-497, and was unconstitutionally vague on its face, *id.* at 497-504. Petitioners do not advance either of those arguments here.

Whatever its standing in the abstract, Section 857 is not unconstitutionally vague as applied to petitioners. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). "[T]he more important aspect of the vagueness doctrine 'is * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 358, quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974). See also *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

Section 857 meets that constitutional standard. First, the statutory list of examples of drug paraphernalia provides potential defendants and law enforcement officers with "guideposts to prohibited conduct." *United States* v. *Dyer*, 750 F. Supp. 1278, 1296 (E.D. Va. 1990). See also *Mishra*, 979 F.2d at 309; *Schneiderman*, 968 F.2d at 1568. Such a list "lends greater definiteness to the statute and enhances, rather than diminishes, the notice of proscribed conduct." *Murphy* v. *Matheson*, 742 F.2d 564, 572 (10th Cir. 1984). See *Hoffman Estates*, 455 U.S. at 500-501 and n.18 (finding "speculation about the meaning of 'design' * * * largely un-

founded" because guidelines refer to specific items "as conclusively 'designed' or not 'designed' for illegal use"). Many of the items at issue in this case—including bongs, roach clips, and pipes designed for use with illegal drugs—are listed in Section 857(d). There is no plausible basis for arguing that the statute is unconstitutionally vague concerning those items.

Second, the factors set out in Section 857(e) "tend to minimize the likelihood of arbitrary enforcement by providing objective criteria against which to measure possible violations of the law." *Schneiderman*, 968 F.2d at 1568; see also *Mishra*, 979 F.2d at 309; *Dyer*, 750 F. Supp. at 1296-1297. The statutory factors ensure that "any decisions about prohibited dealing in drug paraphernalia are 'susceptible to appropriate reevaluation: the prosecutor can assess the arresting officer's case, the trial court can put the prosecutor to his proof, and the reviewing court can examine the trial court's findings.'" *United States* v. *Main Street Distributing, Inc.*, 700 F. Supp. 665, 669 (E.D.N.Y. 1988), quoting *Levas & Levas* v. *Village of Antioch*, 684 F.2d 446, 454 (7th Cir. 1982).

Third, the exemption in Section 857(f) for tobacco-related products further restricts the scope of the statute and "help[s] safeguard legitimate users of legal products from discriminatory enforcement." *Schneiderman*, 968 F.2d at 1568. See also *Dyer*, 750 F. Supp. at 1297. Finally, an implied *mens rea* requirement helps to cure any vagueness problem. See *Hoffman Estates*, 455 U.S. at 499 ("scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice * * * that [the] conduct is proscribed").

To be sure, Section 857 applies to "dual-use items"—items that have legitimate as well as illegitimate uses. "[A] certain degree of ambiguity necessarily surrounds the[] classification" of such items. *Mishra*, 979 F.2d at 309. But that does not mean the law is unconstitutionally vague.

> Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

Hamling v. *United States*, 418 U.S. 87, 124 (1974), quoting *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930).

In any event, this is not a borderline case involving an otherwise legitimate merchant engaged in isolated sales of dual-purpose items. Petitioners operated a "head shop"—a business devoted substantially to the sale of drug paraphernalia. Petitioners dealt in items that were included among the examples of drug paraphernalia in Section 857(d), such as bongs, roach clips, and pipes designed exclusively for use with drugs. Petitioners also sold other items, such as cocaine diluents advertised as such, that clearly met the statutory standards of Section 857(e) for items that are drug paraphernalia. In short, petitioners' conduct was at the core of the prohibited conduct defined by Section 857.

II. PETITIONER ACTY WAS PROPERLY CONVICTED OF AIDING AND ABETTING THE MANUFACTURE AND DISTRIBUTION OF COCAINE

A. The Jury Instructions Required The Government To Prove That Petitioner Acted For The Purpose Of Aiding The Manufacture Or Distribution Of Cocaine

Petitioner Acty contends (Pet. Br. 16-17) that she was improperly convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 4). She asserts (Br. 16-17) that "[t]he government's witnesses testified that mannitol, mannite and inositol were 'objectively' drug paraphernalia," and that under the district court's instructions the jury was "required * * * to find that the substances were intended for manufacturing with a controlled substance." Petitioner argues that the district court's instructions "create[d] 'a presumption that relieve[d] the [government] of its burden of persuasion on an element of the offense,'" in violation of the Due Process Clause of the Fifth Amendment. Pet. Br. 17, quoting *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985). Petitioner did not raise that argument in the court of appeals, and that court did not address it. In any event, petitioner's contention clearly lacks merit.

The district court's instructions to the jury on Count 4 required the government to prove that petitioner (1) knew that Randy Kennedy was engaged in the manufacture or distribution of illegal drugs, and (2) acted for the purpose of aiding Kennedy in the commission of that crime. The district court instructed the jury that in order to have aided and abetted Randy Kennedy's drug trafficking activities,

petitioner must, before or at the time the crime was committed:

> 1. Have known that the crime of the manufacture or distribution of cocaine was being committed or going to be committed by Randy Kennedy; and
> 2. Have knowingly acted in some way for the purpose of aiding the commission of the manufacture or distribution of cocaine by Randy Kennedy; and
> 3. Have done so knowingly.

J.A. 27. Accordingly, there is no basis for petitioner's assertion that the district court shifted the burden of proving *mens rea* to petitioner.

In addition, the district court did not instruct the jury that drug diluents are "*per se*" drug paraphernalia for purposes of Section 857—let alone for purposes of Section 841(a). In instructing the jury on Counts 1 and 2 (the Section 857 counts), the court read to the jury the list of items in Section 857(d). J.A. 29-30. Mannitol, mannite, and inositol are not among the items listed in Section 857(d). The court then instructed the jury that "if an item does not appear on this list," the jury should consider the eight factors set out in Section 857(e) to determine whether the item "constitute[s] drug paraphernalia for purposes of Section 857." J.A. 30. Finally, the court instructed the jury that "it is for you to determine the primarily intended use of any item by considering * * * all logically relevant factors." J.A. 31. In short, the district court did not instruct the jury that the drug diluents that petitioner sold to Randy Kennedy are "per se drug paraphernalia."

B. The Evidence Was Sufficient To Support Petitioner's Conviction For Aiding And Abetting The Manufacture And Distribution Of Cocaine

The petition presents the question "[w]hether the proof was adequate below for a jury to find guilt under 21 U.S.C. 841(a)(1)." Pet. iv. Petitioners' brief on the merits does not argue that the evidence was insufficient to support Acty's conviction on Count 4. That claim has therefore been waived. See Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* § 13.8 (6th ed. 1986) ("A question set forth in a petition * * * will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted."). In any event the evidence at trial was sufficient to support petitioner's conviction.

In order to aid and abet another to commit a crime, "it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Petitioner does not dispute that the 'knowing supply of a raw material necessary for the commission of a crime by another" may constitute aiding and abetting. *United States* v. *Perry*, 643 F.2d 38, 44 (2d Cir.), cert. denied, 454 U.S. 835 (1981). See also *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709 (1943) (prolonged cooperation between supplier and user gives supplier a "stake in the venture" operated by the user); *Hanauer* v. *Doane*, 79 U.S. (12 Wall.) 342, 347 (1870); *United States* v. *Eberhardt*, 417 F.2d 1009, 1013 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 746-748 (3d ed. 1982).

The evidence presented at trial showed that, from March 1989 until January 1990, Randy Kennedy distributed cocaine in central Iowa. Tr. 1547-1549. Kennedy obtained his cocaine in Phoenix, Arizona. Tr. 1548. He "cut" or diluted the cocaine using mannitol, procaine, or other chemicals that he obtained from Forbidden Fruit, and he also obtained scales for weighing the cocaine and plastic baggies for packaging it from Forbidden Fruit. Tr. 1550-1553, 1557. Kennedy testified that he made so many trips to Forbidden Fruit that he could not count them. Tr. 1552. In all, he spent between $2,000 and $4,000 at the store during this period. He made all his purchases in cash. *Ibid.* Kennedy testified that he knew Acty and that she had personally sold him some of the items that he purchased. Tr. 1554-1555. Kennedy asked to purchase "cut" on occasion. Tr. 1566. Acty indicated to Kennedy that he should not use that word. Tr. 1573. Kennedy testified that there was "no question" in his mind that "everybody in that store knew what I was there for, and really had the idea that I was using this stuff to cut and package and distribute cocaine." Tr. 1573.

The government also presented evidence that Acty sold drug diluents to at least three other drug dealers in amounts that would be used by drug dealers. Pet. App. A40; Tr. 40-43, 721, 1502. One of the dealers frequented the shop four or five times a week and spent $5,000 there in a five-month period. Tr. 721. In addition, Acty's advertisement for one of the drug diluents specifically stated that it was to be used to "cut" cocaine. Pet. App. A40; GX 164.

This evidence, together with the overwhelming evidence that Acty was operating a "head shop," established Acty's knowledge of the drug-related character of the items she sold to Kennedy. From the nature, frequency, and size of Kennedy's purchases, the jury was justified in concluding that Acty knew that Kennedy was engaged in drug trafficking. Likewise, the jury could reasonably infer that Acty sold Kennedy the tools of his trade for the purpose of aiding in the manufacture and distribution of cocaine. Acty had a continuing personal stake in the success of Kennedy's illicit operations—reaping the profits that she knew would come from his repeated purchases of drug paraphernalia. See *Direct Sales Co.*, 319 U.S. at 713. Accordingly, Acty was properly convicted of aiding and abetting Kennedy's drug trafficking activities.[15]

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[15] Acty also contends (Br. 17-18) that her conviction for money laundering in violation of 18 U.S.C. 1956(a)(1) should be reversed. She did not raise that issue in her petition for a writ of certiorari. Accordingly, she is not permitted to raise it in her brief on the merits. See Sup. Ct. R. 24.1(a). In any event, her argument is unconvincing. Contrary to Acty's assertion, the district court specifically instructed the jury that an "essential element" of the offense of money laundering is "[t]hat the defendant whose case you are considering knew the monetary instruments involved represented the proceeds of an unlawful activity" and "intended the financial transactions to promote the sale of drug paraphernalia and to aid and abet in the manufacture and distribution of a controlled substance." J.A. 28.

Finally, Acty asserts (Br. 4, 15) that her convictions for investing income derived from a drug offense, in violation of 21 U.S.C. 854 (Count 5), and engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. 1957 (Counts 7 and 8), must also be reversed. She did not raise that argument in the petition for certiorari or in the court of appeals, and it is therefore not properly presented here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 857 of Title 21, U.S. Code (1988), provides:

§ 857. Interstate and foreign sale and transportation of drug paraphernalia

(a) Unlawful acts

It is unlawful for any person—

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;

(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than $100,000.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) "Drug paraphernalia" defined

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513) [21 U.S.C. 801 et seq.]. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as—

(1) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
(2) water pipes;
(3) carburetion tubes and devices;
(4) smoking and carburetion masks;
(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;
(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;
(7) chamber pipes;
(8) carburetor pipes;
(9) electric pipes;
(10) air-driven pipes;
(11) chillums;
(12) bongs;
(13) ice pipes or chillers;

(14) wired cigarette papers; or
(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;
(2) descriptive materials accompanying the item which explain or depict its use;
(3) national and local advertising concerning its use;
(4) the manner in which the item is displayed for sale;
(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
(7) the existence and scope of legitimate uses of the item in the community; and
(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or
(2) any item that, in the normal lawful course of business, is imported, exported, trans-

ported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

2. The Model Drug Paraphernalia Act provides:

ARTICLE I

(DEFINITIONS)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"( ) The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, con-

verting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a contorlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for

use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or to short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this Act;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use."

ARTICLE II

(OFFENSES AND PENALTIES)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

"SECTION (A) (POSSESSION OF DRUG PARAPHERNALIA)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (B) (MANUFACTURE OR DELIVERY OF DRUG PARAPHERNALIA)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, com-

pound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (C) (DELIVERY OF DRUG PARAPHERNALIA TO A MINOR)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (D) (ADVERTISEMENT OF DRUG PARAPHERNALIA)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

ARTICLE III

(CIVIL FORFEITURE)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all paraphernalia as defined by Section ( ) of this Act."

ARTICLE IV

(SEVERABILITY)

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

3. Section 841(a) of Title 21, U.S. Code provides:

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent ot distribute or dispense, a counterfeit substance.

4. Section 2 of Title 18, U.S. Code, provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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